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COURT OF APPEALS
REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CHINA GROVE 152, LLC AND DAVID R. INVESTMENTS, LLC, PLAINTIFFS
v.
TOWN OF CHINA GROVE, DEFENDANT

No. COA14-972

Filed 7 July 2015

1. Judgments—findings and conclusions—distinguished

The trial court’s determinations that the an Adequate Public Facilities Ordinance (APFO) was “illegal” and “not specifically authorized by North Carolina law” were conclusions of law, not findings of fact and were reviewed de novo. The labels “findings of fact” and “conclusions of law” employed by the trial court in a written order did not determine the nature of the review, nor did the words “found” or “finding” in a statute. The dispositive determination under N.C.G.S. § 160A-363(e) turned on whether the APFO was illegal. Because any determination of legality inherently involves the “application of legal principles,” the trial court’s determinations that the APFO was “illegal” and “not specifically authorized by North Carolina law” were conclusions of law, not findings of fact.

2. Cities and Towns—impact fees—interest

The trial court’s legal conclusion that defendant must return an impact fee plus interest was affirmed. Following *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, China Grove’s Adequate Public Facilities Ordinance was invalid as a matter of law.

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[242 N.C. App. 1 (2015)]

3. Cities and Towns—impact fees—illegally imposed—voluntarily returned—interest

Defendant was entitled to recover interest on an impact fee that was illegally required by defendant-town of plaintiff-developer. Defendant argued that the fee was voluntarily returned and was not the subject of an underlying judgment entered against defendant, so that plaintiffs were barred from bringing their claim for interest. However, the plain language of N.C. Gen. Stat. § 160A-363(e) neither prevents a claim for interest when the city returns the principal amount to a claimant nor bars a claim for interest that arises from a separate civil action.

4. Cities and Towns—impact fees—illegally imposed—accord and satisfaction—interest not included

Plaintiffs' claim for recovery of interest on illegal impact fees was not barred by the common law doctrine of accord and satisfaction. Plaintiffs accepted the return of the impact fee and initialed defendant's letter, so that there was an offer and acceptance of a mutual release. However, the letter contained no reference to interest payments.

Appeal by defendant from order entered 30 June 2014 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 18 March 2015.

DeVore, Acton & Stafford, PA, by Derek P. Adler, for plaintiffs.

Brooke & Brooke Attorneys, by Thomas M. Brooke for defendant.

INMAN, Judge.

This case requires us to interpret statutes allowing land developers to recover damages, including interest, for impact fees illegally exacted by cities and towns as a condition of development and construction. Defendant appeals from an order entered 30 June 2014 denying its motion to dismiss plaintiffs' claim, granting plaintiffs' motion for judgment on the pleadings, and awarding plaintiffs \$18,221.58 in unpaid interest. After careful consideration, we affirm.

I. Facts and Legal Background

Because the actions taken by the parties in this case are governed by prior appellate decisions and statutes, we summarize the factual background within the chronology of legal developments.

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In June 2006, this Court issued *Durham Land Owners Ass'n v. Cnty. of Durham*, 177 N.C. App. 629, 630 S.E.2d 200, *writ denied, review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006), holding that a school impact fee imposed by Durham County as a prerequisite to development approval was not specifically authorized by the General Assembly, and was therefore illegal. While the Court ruled that a refund of the fees was an appropriate remedy, it declined to order the County to pay interest on those fees, noting that interest “may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so.” *Id.* at 640, 630 S.E.2d at 207 (quotation marks omitted).

In 2007, one year after this Court issued its ruling in *Durham Land Owners Ass'n*, the General Assembly passed Senate Bill 1152, “an act to require counties and cities to pay interest on illegally exacted taxes, fees, or monetary contributions for development that are not specifically authorized by law.” See 2007 N.C. Sess. Laws ch. 371. That act amended N.C. Gen. Stat. § 153A-324 and N.C. Gen. Stat. § 160A-363 to include the following: “If the [county/city] is found to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the [county/city] shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum.”

Town of China Grove (“defendant”) is an unincorporated municipality located in Rowan County. Defendant enacted an Adequate Public Facilities Ordinance (“APFO”) requiring land developers to pay impact fees as a condition of obtaining necessary permits for development.¹ In relevant part, the purpose and intent of the APFO is the following:

A. To ensure that public facilities needed to support new residential development meet or exceed the level of service standards established herein.

...

C. To ensure that no application is approved which would cause a reduction in the levels of service for any public facilities below the adopted level of service established in this ordinance.

1. Although the content of the APFO was before the trial court, the record contains no information about the date or manner in which it was enacted.

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D. To ensure that adequate public facilities needed to support new residential development are available concurrent with the impacts of such development[.]

The general purpose of the fee was “to ensure funding existed to accommodate the potentially increased public needs of the newly built neighborhood.”

On 6 February 2008, China Grove 152, LLC and David R. Investments, LLC (“plaintiffs”) paid a fee of \$54,284 required by defendant pursuant to the APFO in order to begin development of the Miller’s Grant Subdivision in China Grove.

On 24 August 2012, during the development of the subdivision, the North Carolina Supreme Court issued *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012). In *Lanvale*, the Court struck down Cabarrus County’s APFO (which the Court noted was “a very effective means of generating revenue”) because it was not specifically authorized by statute. *Id.* at 161, 731 S.E.2d at 814-15. The Court held that “absent specific authority from the General Assembly, APFOs that effectively require developers to pay an adequate public facilities fee to obtain development approval are invalid as a matter of law.” *Id.*

On 21 August 2013, plaintiffs sent a letter to defendant requesting reimbursement of the APFO fee with interest in light of our Supreme Court’s decision in *Lanvale*. Defendant responded on 5 September 2013 with a letter enclosing a check payable to plaintiffs for \$54,284. The letter stated that the sum “represents a return of your payment pursuant to the [APFO] for the expected public facilities impact of the [subdivision].” Defendant’s letter further stated that “[w]e will consider our offer and your acceptance of our check in the amount of \$54,284.00, as a complete mutual release of all obligations and liabilities under [the APFO][.]”

In April 2014, plaintiffs filed a complaint for declaratory judgment to secure interest owed on the principal APFO sum of \$54,284. On 22 May 2014, plaintiffs filed a motion for judgment on the pleadings, and defendant subsequently filed a corresponding motion to dismiss plaintiffs’ claim. The trial court denied defendant’s motion and granted plaintiffs’ motion, ruling that the payment made pursuant to the APFO was an illegally exacted fee not specifically authorized by North Carolina law. Pursuant to N.C. Gen. Stat. § 160A-363(e), the trial court ordered that defendant pay 6% per annum interest on the principal sum from the date plaintiffs paid the APFO fee (8 February 2008) to the date defendant

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[242 N.C. App. 1 (2015)]

returned the principal sum to plaintiffs (11 September 2013) for a total of \$18,221.58².

II. Analysis

a.) Legality of the Fee

[1] Defendant first argues that the APFO is a valid ordinance pursuant to N.C. Gen. Stat. § 160A-372 (2013), and that consequently the trial court erred in entering judgment in favor of plaintiffs. We disagree.

A judgment on the pleadings “is a method by which the trial court may dispose of a claim when it is evident from the face of the pleadings that the claim lacks merit.” *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 600, 544 S.E.2d 797, 799 (2001). The reviewing court must scrutinize all facts and permissible inferences in the light most favorable to the nonmoving party. *Id.* A trial court should grant a motion for judgment on the pleadings only when “the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” *Tradewinds Campground, Inc. v. Town of Atl. Beach*, 90 N.C. App. 601, 602, 369 S.E.2d 365, 365 (1988) (citation and quotation marks omitted).

N.C. Gen. Stat. § 160A-363(e) provides that “[i]f [a] city is *found* to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the city shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum.” (Emphasis added.) Presumably based on the General Assembly’s use of the word “found” in section 160A-363(e), the trial court, in its findings of fact, determined that the APFO “is an illegally exacted tax, fee, or monetary contribution for development or a development permit and that said tax, fee, or monetary contribution is not specifically authorized by North Carolina law[.]”

However, “[t]he labels ‘findings of fact’ and ‘conclusions of law’ employed by the trial court in a written order do not determine the nature of our review.” *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012). Nor does the use of the word “found” or “finding” in a statute control whether the trial court’s determination is actually a finding of fact or a conclusion of law. *See, e.g., McMillan v. Ryan Jackson Properties, LLC*, __ N.C. App. __, __, 753 S.E.2d 373, 376 (2014) (holding that the decision to award attorneys’

2. Because defendant does not challenge the amount of interest awarded to plaintiffs, we do not address the trial court’s calculation of this sum. *See* N.C. R. App. P. 28.

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fees for an action brought “without reasonable cause” was a conclusion of law because it involved the application of legal principles, despite the statute authorizing fees based on a “finding” by the trial court that the action was brought “without reasonable cause”).

The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and quotation marks omitted).

The nature of the inquiry described in section 160A-363(e) is purely an issue of whether a municipal ordinance complies with North Carolina law. The parties agree that the determination of whether the APFO is illegal turns on the holding of *Lanvale*, 366 N.C. at 142, 731 S.E.2d at 800, and the application of various statutes setting out the powers of counties, cities, and towns. These are sources of law, not evidentiary facts. Indeed, the dispositive determination under section 160A-363(e) turns on whether the APFO is “illegal.” Because any determination of legality inherently involves the “application of legal principles,” *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675, the trial court’s determinations that the APFO is “illegal” and “not specifically authorized by North Carolina law” are conclusions of law, not findings of fact. As such, we review these conclusions *de novo*. See *Westmoreland*, 218 N.C. App. at 79, 721 S.E.2d at 716 (“If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that ‘finding’ *de novo*.”).

[2] As to the legality of the APFO, defendant argues that “[n]othing on the face of the ordinance makes Plaintiff’s fee illegal,” because the nature of the China Grove APFO is distinguishable from the APFO in *Lanvale*. We disagree.

The *Lanvale* Court held that “absent *specific* authority from the General Assembly, APFOs that effectively require developers to pay an adequate public facilities fee to obtain development approval are invalid as a matter of law.” *Lanvale*, 366 N.C. at 163, 731 S.E.2d at 815 (emphasis added).

Here, the China Grove APFO states that its purpose is to “ensure that public facilities needed to support new residential development meet

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or exceed the level of service standards established herein.” Plaintiffs alleged in their complaint, and defendant admitted in its answer, that defendant required plaintiffs to pay an APFO fee of \$54,284 “to ensure funding existed to accommodate the potentially increased public needs of the newly built neighborhood.” Therefore, because it is undisputed that this was an “adequate public facilities fee” required for plaintiffs to gain development approval, the dispositive question is whether the General Assembly provided specific authority for that fee. *See id.*

Defendant contends that the APFO is actually a subdivision control ordinance as provided for in N.C. Gen. Stat. § 160A-372, and under the language of that statute, defendant argues that the General Assembly specifically authorized the adequate public facilities fee. Even assuming, however, that the APFO is a subdivision control ordinance within the scope of section 160A-372, the ordinance’s provision for a public facilities fee has not been specifically authorized by the General Assembly. Nothing in section 160A-372 authorizes a city or town, specifically or generally, to enact an adequate public facilities fee as a condition precedent for development approval. Section 160A-372(c) provides that a subdivision control ordinance “*may* provide that a developer *may* provide funds to the city whereby the city *may* acquire recreational land” for parks, (emphasis added); that language is clearly permissive and does not authorize municipalities to charge fees as a condition precedent to subdivision approval, as the APFO did here. *See Loren v. Jackson*, 57 N.C. App. 216, 219, 291 S.E.2d 310, 312 (1982) (noting that the use of the word “may” in a statute “generally connotes permissive or discretionary action and does not mandate or compel a particular act” (quotation marks omitted)). Contrary to defendant’s argument, there are no provisions in section 160A-372 authorizing China Grove to make its development approval contingent on securing funds to subsidize its law enforcement, fire protection, and parks, which was the stated purpose of the APFO.

It is also immaterial that the APFO in *Lanvale* sought to subsidize schools, as distinguished from the APFO here, which sought to subsidize the town’s police force, fire departments, and parks. The *Lanvale* Court did not limit its holding to adequate public schooling fees but rather “adequate public facilities fee[s].” *Lanvale*, 366 N.C. at 163, 731 S.E.2d at 815 (emphasis added).

Following *Lanvale*, we conclude that China Grove’s APFO was invalid as a matter of law. *Id.* Therefore, because China Grove “illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law,” we affirm the

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[242 N.C. App. 1 (2015)]

trial court's legal conclusion that defendant must "return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum," as required by the plain language of section 160A-363(e).

b.) Defendant's Motion to Dismiss

[3] Next, defendant argues the trial court erred by denying its motion to dismiss plaintiffs' complaint because it failed to state a claim upon which relief can be granted. Specifically, defendant contends that a claimant is not entitled to recover interest pursuant to N.C. Gen. Stat. § 160A-363(e) when the municipality has already voluntarily refunded the illegally extracted fee. We disagree.

"In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be viewed as admitted, and the motion should not be allowed unless the complaint affirmatively shows that plaintiff has no cause of action." *Gatlin v. Bray*, 81 N.C. App. 639, 640, 344 S.E.2d 814, 815 (1986). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

The longstanding rule in North Carolina was that interest "may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so." *Durham Land Owners Ass'n*, 177 N.C. App. at 640, 630 S.E.2d at 207; *see also Shavitz v. City of High Point*, 177 N.C. App. 465, 485, 630 S.E.2d 4, 18 (2006) (explaining that "because counties and cities are political subdivisions of the State, it follows that [interest cannot be imposed] against a county or city acting in its sovereign capacity"). Therefore, in *Durham Land Owners Ass'n*, "[d]espite the [c]ounty's unauthorized actions[,] this Court did not award interest as requested by plaintiffs because there was "no statutory authority for the award of interest[.]" *Durham Land Owners Ass'n*, 177 N.C. App. at 640, 630 S.E.2d at 207.

Following this Court's decision in *Durham Land Owners Ass'n*, the General Assembly enacted N.C. Gen. Stat. § 160A-363(e) and N.C. Gen. Stat. § 153A-324 allowing for developers to seek interest on fees illegally exacted by cities and counties. N.C. Gen. Stat. § 160A-363(e), as previously discussed, states: "If the city is found to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the city shall return the tax,

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[242 N.C. App. 1 (2015)]

fee, or monetary contribution plus interest of six percent (6%) per annum.” N.C. Gen. Stat. § 160A-363(e).

Defendant argues that there is no underlying fund from which to recover interest because the principal has already been refunded to plaintiffs. Defendant posits that because the fee was voluntarily returned and was not the subject of an underlying judgment entered against defendant, plaintiffs are barred from bringing their claim for interest. However, N.C. Gen. Stat. § 160A-363(e) is unambiguous: “If the city is found to have illegally exacted a . . . fee, . . . not specifically authorized by law,” the fee principal shall be returned with interest. *Id.* The statute’s plain language neither prevents a claim for interest when the city returns the principal amount to a claimant nor bars a claim for interest that arises from a separate civil action. Thus, plaintiffs brought an actionable claim to recover interest pursuant to N.C. Gen. Stat. § 160A-363(e). *See Lanvale*, 366 N.C. at 154, 731 S.E.2d at 809-10 (“When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.”).

c.) Doctrine of Accord and Satisfaction

[4] Finally, defendant argues the trial court erred by denying its motion to dismiss because plaintiffs’ claim is barred by the common law doctrine of accord and satisfaction. Specifically, defendant asserts that the plaintiffs’ acceptance of \$54,284, coupled with the initialing of defendant’s letter, established an accord and satisfaction and released defendant from any requirement to pay outstanding interest. We disagree.

The doctrine of accord and satisfaction “is recognized as a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement.” *Prentzas v. Prentzas*, 260 N.C. 101, 103, 131 S.E.2d 678, 680 (1963) (citations and quotation marks omitted).

A valid contract requires an offer, an acceptance, and sufficient consideration. *Barbee v. Johnson*, 190 N.C. App. 349, 355, 665 S.E.2d 92, 97 (2008). Generally, “the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument.” *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (2010) (citation and quotation marks omitted). “When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, . . . and the court cannot look beyond the terms of the contract to determine the intentions

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of the parties.” *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52, *aff’d per curiam*, 317 N.C. 330, 344 S.E.2d 788 (1986) (citations and quotation marks omitted).

The facts *sub judice* demonstrate that a contract existed. Defendant’s letter to plaintiffs constituted an offer, and plaintiffs’ initialing of the letter and cashing of the check was an acceptance with consideration. The contract terms, indicated in the body of the letter, referenced a “mutual release . . . of all obligations and liabilities under the [APFO].” Thus, the terms of the contract clearly denote a waiver of all obligations arising out of the APFO to which both parties agreed. However, the letter contains no reference to a waiver of any obligations or liabilities that might arise vis-à-vis defendant regarding interest payments allowed under N.C. Gen. Stat. § 160A-363(e). *See Lynn*, 202 N.C. App. at 431, 689 S.E.2d at 205.

A release of the obligations contained under the APFO, as indicated by the plain terms of the contract, did not amount to a release of the statutory obligation to pay interest under N.C. Gen. Stat. § 160A-363(e). As such, defendant’s argument that plaintiffs are barred from seeking interest payments under the accord and satisfaction doctrine is without merit.

III. Conclusion

In sum, we affirm the trial court’s order granting plaintiffs’ motion for judgment on the pleadings and denying defendant’s motion to dismiss because the trial court properly concluded that the \$54,284 fee was illegal, plaintiffs’ cause of action to recover interest pursuant to N.C. Gen. Stat. § 160A-363(e) properly states a claim upon which relief can be granted, and plaintiffs’ claim is not barred by the doctrine of accord and satisfaction.

AFFIRMED.

Judges ELMORE and GEER concur.

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[242 N.C. App. 11 (2015)]

DEPARTMENT OF TRANSPORTATION, PLAINTIFF

v.

BB&R, LLC; KENNETH W. FROMNECHT, II, TRUSTEE; ANDY BERRY & SONS, INC.;
UNITED COMMUNITY BANK (GEORGIA); MARICIA J. RINGLE, TRUSTEE;
AND MACON BANK, INC., DEFENDANTS

No. COA14-1185

Filed 7 July 2015

Eminent Domain—N.C.G.S. § 136-108 evidentiary hearing—closure of road abutting property

The trial court did not err by concluding that the closure of Dowdle Mountain Road, which abutted defendant's property, was a lawful exercise of police power and therefore not a compensable taking. Defendant still had access to Dowdle Mountain Road—the property's access point to the road was simply changed. The change did not restrict access to defendant's property.

Appeal by Defendant BB&R, LLC, from the order entered 9 May 2014 by Judge Bradley B. Letts in Macon County Superior Court. Heard in the Court of Appeals 17 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kevin G. Mahoney, for the plaintiff-appellee Department of Transportation.

Cranfill Sumner & Hartzog LLP, by Stephanie H. Autry, George B. Autry, Jr., and Brady W. Wells, for defendant-appellant BB&R, LLC.

McCULLOUGH, Judge.

BB&R, LLC ("defendant") appeals from an order entered by the trial court pursuant to a N.C. Gen. Stat. § 136-108 evidentiary hearing. On appeal, defendant argues the trial court erred in concluding that the closure of Dowdle Mountain Road, which abutted defendant's property, was a lawful exercise of police power and therefore not a compensable taking. For the reasons set forth herein, we affirm the trial court's order.

I. Factual Background

Defendant owns a 1.125 acre tract of land in Franklin, Macon County ("the property"). Located on the property is a convenience store and gas

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station, including diesel fuel facilities. The North Carolina Department of Transportation (“DOT”) condemned portions of the property for a public use highway construction project. However, DOT and defendant were unable to agree to a purchase price for the property. As a result, on 21 June 2010, DOT brought a condemnation action against defendant taking a “[f]ee simple title to right of way, and a slope easement for providing lateral support to the highway, or land adjacent thereto . . . [and] a temporary construction easement to continue until the completion of the project[.]” DOT did not claim to be acquiring defendant’s abutter’s rights of access to Dowdle Mountain Road; however, DOT did close the section of Dowdle Mountain Road that abutted the “entire northern frontage” of defendant’s property.

On 7 July 2010, defendant filed an answer and admitted that DOT and defendant “ha[d] been unable to agree as to the purchase price of the property.” Defendant alleged that the amount DOT deposited with the Clerk of Court was “grossly inadequate” to compensate for the property taken and requested a jury trial to determine proper compensation. On 30 January 2014, DOT filed a motion for a hearing pursuant to N.C. Gen. Stat. § 136-108, specifically requesting that prior to the jury trial, which would address the value of compensation, the court “decide whether the Department of Transportation’s actions in closing a portion of Dowdle Mountain Road [wa]s compensable or whether the said actions constitute[d] a non-compensable exercise of the State’s police power.”

A hearing pursuant to N.C. Gen. Stat. § 136-108 was held at the 10 February 2014 session of Macon County Superior Court, the Honorable Bradley B. Letts presiding. At a hearing pursuant to N.C. Gen. Stat. § 136-108, the trial judge “hear[s] and determine[s] any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.” N.C. Gen. Stat. § 136-108 (2013). At the hearing in this case, the main issue disputed was whether the closing of the portion of Dowdle Mountain Road that abutted the northern front of defendant’s property constituted a compensable taking of defendant’s property.

Both parties stipulated to the following pertinent facts:

2. Before the taking, the subject property’s entire northern frontage, a distance of approximately 338 feet, abutted Dowdle Mountain Road.

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3. Before the taking, there was an access point on the property that was oriented north and accessed Dowdle Mountain Road on the subject property's northern boundary.

4. After the taking, Dowdle Mountain Road has been physically closed along the property's entire northern boundary and the property has no access to Dowdle Mountain Road along its northern boundary.

5. After the taking, the property's north-pointing access has been changed to point west, toward Oak Forest Road.

6. Due to the re-routing of Dowdle Mountain Road, the property now has access to the rerouted Dowdle Mountain Road at a point on its eastern boundary.

....

9. The subject property is not restricted by any legal "control of access" as a result of this Project or the condemnation.

10. A vehicle coming off of Highway 441 and desiring to turn into the western access point on the subject property now has to travel around the traffic circle which is an additional driving distance of approximately 650 feet more than it had to travel in the before condition.

11. In order for an 18 wheel truck approaching the property from the east that desires to also exit east off of the property, it now has to go around the traffic circle and enter the west entrance of the property which is an additional driving distance of approximately 275 [feet] more than it had to travel in the before condition.

On 6 May 2014, the trial court concluded "that the re-routing and discontinuance of a portion of Dowdle Mountain Road [wa]s a legitimate exercise of NCDOT's police powers and [wa]s not compensable[.]" Based on the stipulated facts, the trial court concluded that DOT "did not substantially interfere with the Defendants' access" because "the Defendants retain access to all of the same roads in the after condition as they did in the before condition," and that the "minor circuitry of travel is not compensable." On 31 May 2014, defendant gave this Court notice of appeal of the trial court's order.

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II. Interlocutory Appeal

Generally, this Court reviews a final judgment of the Superior Court, pursuant to N.C. Gen. Stat. § 7A-27(b)(1). An interlocutory order is one that “does not determine the issues[,] but directs some further proceeding preliminary to final decree.” *Dep’t of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708 (1999) (citation and internal quotation marks omitted). An order entered pursuant to N.C. Gen. Stat. § 136-108 is an interlocutory order because “[t]he trial court d[oes] not completely resolve the entire case,” but instead “determine[s] all relevant issues other than damages in anticipation of a jury trial on the issue of just compensation.” *Id.* at 174, 521 S.E.2d at 708-09. Here, the trial court’s order is an interlocutory order. The order is not a final judgment in the proceeding because the jury still must determine the amount of compensation defendant is entitled to for DOT’s taking of its property.

“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Hammer Publ’ns v. Knights Party*, 196 N.C. App. 342, 345, 674 S.E.2d 720, 722 (2009) (citation and internal quotation marks omitted). However an interlocutory order is reviewable by this Court when it “affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.” *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709 (citation omitted). The North Carolina Supreme Court has held that condemnation hearing orders “concerning title and area taken are vital preliminary issues” that affect a party’s substantial right and thus must be immediately appealed pursuant to N.C. Gen. Stat. § 1-277. *Id.* at 176, 521 S.E.2d at 709 (citation and internal quotation marks omitted).

Here, the issue is whether the loss of access to Dowdle Mountain Road on the northern frontage of defendant’s property constitutes a taking of defendant’s appurtenant easement, a legal interest in the road that abuts defendant’s property. This issue affects a substantial right because the question of what area was taken is a “vital preliminary issue” that must be determined before proceeding to a jury trial regarding proper compensation. *Id.* The North Carolina Supreme Court explained that “[o]ne of the purposes of G.S. 136-108 was to eliminate from the jury trial any question as to what land the [State] is condemning and any question as to its title.” *N.C. State Highway Comm’n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). For the jury to determine compensation, it must know whether DOT’s action constituted a compensable taking of defendant’s appurtenant easement in order to know if the defendant should be compensated for the value of its appurtenant easement. Thus,

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the interlocutory order affects defendant's substantial right, and we review the merits of defendant's appeal.

III. Discussion

Defendant raises three issues on appeal. Defendant argues the trial court erred by: (A) concluding that the closure of Dowdle Mountain Road along the northern boundary of defendant's property does not constitute a taking; (B) concluding that "the re-routing and discontinuance of a portion of Dowdle Mountain Road is a legitimate exercise of NCDOT's police powers and is not compensable"; and (C) concluding the precedent regarding abutters' rights of access taken to create controlled access roads is not applicable to the present case. We disagree.

Standard of Review

The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. . . . [U]nchallenged findings of fact are presumed correct and are binding on appeal. The trial court's conclusions of law are subject to *de novo* review.

DOT v. Webster, __ N.C. App. __, __, 751 S.E.2d 220, 226 (2013) (citations and internal quotation marks omitted)

A. and B.

First, in issue (A), defendant contends it is entitled to compensation for the taking of its easement appurtenant in the portion of Dowdle Mountain Road DOT closed. Furthermore, in issue (B), defendant contends that DOT's closure of the portion of Dowdle Mountain Road that abuts its property was not a lawful exercise of police power, but instead constituted a compensable taking. We disagree. Because defendant's arguments (A) and (B) are so closely related, we address these two issues together.

"An owner of land abutting a highway or street has the right of direct access from his property to the traffic lanes of the highway." *DOT v. Harkey*, 308 N.C. 148, 151, 301 S.E.2d 64, 67 (1983). "This right of access is an easement appurtenant." *Snow v. N.C. State Highway Comm'n*, 262 N.C. 169, 173, 136 S.E.2d 678, 682 (1964). Here, defendant had an easement appurtenant in Dowdle Mountain Road because "the [defendant's] property's entire northern frontage . . . abutted Dowdle Mountain Road." However, "not all interferences with easements of access constitute

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a compensable taking pursuant to a state agency's power of eminent domain." *Harkey*, 308 N.C. at 152, 301 S.E.2d at 67.

To determine if the State's action is a compensable taking, the trial court must first determine if the action resulted in eliminating all direct access to the roadway. *See Harkey*, 308 N.C. at 155, 301 S.E.2d at 69. If the State's action eliminates all direct access to the abutting road, then the action is "a taking as a matter of law." *Harkey*, 308 N.C. at 158, 301 S.E.2d at 71. "[W]hen all direct access is taken no inquiry into the reasonableness of alternative access is required to determine liability." *Id.* at 155-56, 301 S.E.2d at 69. In *Harkey*, the North Carolina Supreme Court determined there was no direct access to the roadway because "[a]ccess [was] only available through a series of *local roads* which are part of the city street system," and "no frontage or service road directly visible and accessible from the highway ha[d] been provided." *Id.* at 158, 301 S.E.2d at 70. Accordingly, in *Harkey* the North Carolina Supreme Court held that there was a taking and that the property owners were entitled to compensation for the loss of direct access to the abutting road. *Id.* at 149, 301 S.E.2d at 65.

Here, however, DOT's closure of the section of Dowdle Mountain Road that abutted the northern frontage of defendant's property did not eliminate all direct access from defendant's property to Dowdle Mountain Road. There is direct access to the re-routed Dowdle Mountain Road at the eastern boundary of defendant's property. Prior to the re-routing of Dowdle Mountain Road, defendant's property had a service road located at the eastern boundary of its property that connected to an unpaved road, which could be used to access Dowdle Mountain Road. After the completion of DOT's construction project, the service road on the eastern side of defendant's property directly abuts the re-routed Dowdle Mountain Road. In comparing Plaintiff's Exhibit 1, which depicts the property's road access prior to construction, and Plaintiff's Exhibit 3, which depicts the property's road access after completion of the construction, it is clear that defendant's property now has direct access to the re-routed Dowdle Mountain Road from a paved driveway on the eastern side of the property, where the unpaved service road had been located. In fact, the trial court properly concluded that "[p]rior to the taking, the Defendants had two access points, one that led to the four lane Highway 441, and the other onto Dowdle Mountain Road," and "[a]fter the taking, the Defendants still had two access points, one that leads to the four lane Highway 441, and the other onto Dowdle Mountain Road." The access to Dowdle Mountain Road from defendant's property accommodates 18 wheel trucks, thus the new route does not restrict

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who can access defendant's property. At most, the re-routed road results in a vehicle having to travel a maximum of 650 feet more than it had to travel before to access defendant's property from the highway. These minimal changes do not result in a compensable taking because defendant still has direct access to Dowdle Mountain Road.

Since DOT's actions did not eliminate all direct access to Dowdle Mountain Road, the trial court properly considered whether the DOT exercised its police power in re-routing Dowdle Mountain Road. If direct access to the roadway still exists then the trial court's decision should be "based on a police-power analysis." *Harkey*, 308 N.C. at 158, 301 S.E.2d at 71. The North Carolina Department of Transportation has the power "to change or relocate any existing roads that the Department of Transportation may now own or may acquire[.]" N.C. Gen. Stat. § 136-18(2) (2013). Thus, "the determinative question is whether reasonable, direct access [to Dowdle Mountain Road] has been provided." *Harkey*, 308 N.C. at 158, 301 S.E.2d at 71.

Defendant correctly contends that a property owner is entitled to compensation as a matter of law, even if direct access to the abutting road is not completely eliminated, but is substantially interfered with by the State. *State Highway Comm'n v. Yarbourough*, 6 N.C. App. 294, 302, 170 S.E.2d 159, 165 (1969). To determine if the defendant's direct access to the abutting road has been substantially interfered with, the trial court must determine whether a "reasonable means of ingress and egress remains or is provided[.]" *Id.* at 302, 170 S.E.2d at 165. If the trial court determines there is a "reasonable means of ingress and egress" from the street that previously abutted the property, then the State act is not a compensable taking, but instead a "legitimate exercise of the police power." *Id.* The North Carolina Supreme Court explained that "those who . . . purchase and occupy property in proximity to public roads or streets do so with notice that they may be changed as demanded by the public interest." *Sanders et al. v. Town of Smithfield*, 221 N.C. 166, 170-71, 19 S.E.2d 630, 633 (1942). Therefore, "[t]o justify recovery . . . the damages must be direct, substantial and proximate, and not such as are attributable to mere inconvenience[.]" *Id.* at 171, 19 S.E.2d at 633. "While the abutting owner has a right of access, the manner in which that right may be exercised is not unlimited. . . . the sovereign may restrict the right of entrance to reasonable and proper points." *Nuckles*, 271 N.C. at 21, 155 S.E.2d at 788 (citation and internal quotation marks omitted).

Here, defendant still has "reasonable means of ingress and egress" from Dowdle Mountain Road to the property. *Yarbourough*, 6 N.C. App.

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at 303, 170 S.E.2d at 165. Defendant's access to Dowdle Mountain Road was simply re-located to the eastern section of its property due to the re-routing of Dowdle Mountain Road. Defendant erroneously contends the action taken by DOT is analogous to the action taken by the Board of Transportation in *Dr. T.C. Smith Co. v. N.C. Highway Commission*, where the Board of Transportation "completely cut off and totally denied plaintiff's abutter's rights of direct access to [the abutting street] by including it within [a] controlled-access [h]ighway[.]" *Dr. T.C. Smith Co. v. N.C. Highway Comm'n*, 279 N.C. 328, 334, 182 S.E.2d 383, 387 (1971). As a result, the property owner had no direct access to the abutting street, and the North Carolina Supreme Court held that the Board of Transportation's act was not a lawful exercise of police power, but instead constituted a compensable taking. *Id.* at 337, 182 S.E.2d at 388. In the present case, Dowdle Mountain Road was not turned into a controlled access highway. Instead, the portion that abutted the northern frontage of defendant's property was completely closed, and the road was re-routed. Unlike in *Dr. T.C. Smith*, where the property owner lost all direct access to the abutting road, defendant still has direct access to Dowdle Mountain Road. DOT merely used its police powers to re-route Dowdle Mountain Road and as a result changed where the property's access point to Dowdle Mountain Road is located. Therefore, the trial court did not err in concluding DOT's action was a lawful exercise of police power and thus not a compensable taking.

C.

In the last argument, defendant contends the trial court erred in concluding that *Dep't of Transp. v. Harkey*, 308 N.C. 148, 301 S.E.2d 64 (1983) and *Frander v. Bd. of Transp.*, 66 N.C. App. 344, 311 S.E.2d 308 (1984) are not applicable because "[c]ompensation for when NCDOT legally controls access, like in the *Harkey* and the *Frander* cases, is compensated under a different statute, G.S. § 136-89.53, than the one governing compensation in this case, G.S. § 136-112." We disagree.

Defendant argues on appeal that the trial court's conclusion amounts to holding that a compensable taking of a property owner's abutter's right of access only occurs when DOT makes the abutting road a closed access road. Defendant's argument mischaracterizes the trial court's conclusion. The trial court did not conclude that converting a road to a controlled access highway is the only way to have a compensable taking of an abutter's right of access. Instead, the trial court clarified that when the State makes a road a closed access road that action is distinguishable from completely closing a portion of the road, as was done here.

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A controlled access highway is “a State highway, or section of State highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property, or others, shall have only a controlled right or easement of access.” N.C. Gen. Stat. § 136-89.49(2) (2013). In both *Harkey* and *Frander*, all direct access to the roads that previously abutted the defendants’ properties was eliminated when the State turned the abutting roads into closed access roads. *See Harkey*, 308 N.C. at 149, 301 S.E.2d at 66 (finding that “the church property will have no direct access to the new [controlled access] highway once it is completed”); *Frander*, 66 N.C. App. at 346, 311 S.E.2d at 310 (concluding the State’s controlled access highway project resulted in all direct access from defendant’s property to the abutting road being eliminated). The trial court clarified that the State action taken in *Harkey* and *Frander* – making the abutting road a closed access road – is distinguishable from the action in this case. We hold that the trial court properly found these cases were distinguishable from the present case.

Defendant is correct in its contention that the action of creating a closed access road is not required to have a compensable taking. In fact, re-routing a road could result in a compensable taking. The main issue is not what action the State took but whether that action eliminated all direct access to the abutting road, as previously discussed. *See Harkey*, 308 N.C. at 154, 301 S.E.2d at 71.

Not only is the State action of creating a closed access road different from closing a portion of the abutting road, but the applicable statute is also different. N.C. Gen. Stat. § 136-89.53 specifically codifies that when the State converts a road to a closed access road that act results in a compensable taking for property owners with an abutter’s right of access to that road. N.C. Gen. Stat. § 136-89.53 (2013)¹. Defendant is correct that N.C. Gen. Stat. § 136-89.53 does not change the aforementioned case law regarding compensable takings of abutters’ rights of access, it simply codifies the result when the State action is converting a road to a closed access road. *Id.* However, the trial court correctly explains that it would be improper to rely upon case law that is governed by a statute that is inapplicable in this case. Thus, the trial court did not err by

1. “The Department of Transportation . . . may designate and establish an existing street or highway as included within a controlled-access facility. When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access.” N.C. Gen. Stat. § 136-89.53 (2013).

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concluding that *Harkey* and *Frander* were not applicable to the present case based on the fact that DOT did not make Dowdle Mountain Road a controlled access road.

AFFIRMED.

Judges CALABRIA and DIETZ concur.

DOUGLAS C. EARL, AND GALE L. SIMMET, AS CO-TRUSTEES OF THE EARL/SIMMET LIVING TRUST, DATED FEBRUARY 2, 2013, PLAINTIFFS

v.

CGR DEVELOPMENT CORPORATION, A CORPORATION, AND CAREFREE COVE COMMUNITY ASSOCIATION, INC., DEFENDANTS

No. COA14-1219

Filed 7 July 2015

1. Appeal and Error—interlocutory orders and appeals—substantial right—arbitration

An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

2. Arbitration and Mediation—motion to stay action—motion to compel—sufficiency of findings of fact

The trial court erred by denying defendants' motion to dismiss and alternative motion to stay action pending arbitration and to compel arbitration. The trial court failed to make any of the requisite findings of fact or conclusions to show: (1) whether the parties had a valid agreement to arbitrate; and (2) whether this matter fell within the scope of that agreement.

Appeal by defendants from order entered 20 August 2014 by Judge Richard L. Doughton in Ashe County Superior Court. Heard in the Court of Appeals 18 May 02015.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Frank C. Wilson, III, for plaintiffs-appellees.

Rossabi Black Slaughter, P.A., by Gavin J. Reardon, for defendants-appellants.

EARL v. CGR DEV. CORP.

[242 N.C. App. 20 (2015)]

TYSON, Judge.

CGR Development Corporation and Carefree Cove Community Association, Inc. (collectively, “Defendants”) appeal from order denying their motion to dismiss and alternative motion to stay action pending arbitration and to compel arbitration. We reverse and remand.

I. Factual Background

Carefree Cove is a residential subdivision located within Ashe and Watauga Counties, North Carolina. All lots in Carefree Cove are subject to the Declaration of Covenants and Restrictions of Carefree Cove (“the Restrictive Covenants”). Defendant CGR Development Corporation is the Declarant that filed the Restrictive Covenants, which were recorded on 12 July 2001 in the Ashe County Registry. Defendant Carefree Cove Community Association, Inc. (“the Association”) is the homeowner’s association for Carefree Cove.

The Association is subject to the Bylaws of Carefree Cove Community Association, Inc. (“the Bylaws”). Article 10 of the Bylaws provides, in part: “Prior to the institution of litigation, the parties to a dispute shall submit the dispute to the American Arbitration Association for binding arbitration.”

Plaintiffs own two lots in Carefree Cove, conveyed subject to all covenants and restrictions set out in the Restrictive Covenants. On 17 December 2013, Plaintiffs filed a complaint against Defendants alleging Defendant CGR “refused to perform all affirmative acts required . . . in the Restrictive Covenants, to convey the common areas to the association, turn over the management of Association and allow the members to elect at least majority [sic] of the Board of Administrators of the Association as set forth in . . . the Declaration.” Plaintiffs sought a declaratory judgment to require Defendant CGR to perform these affirmative acts. Plaintiffs’ claim for relief requested an order compelling Defendant CGR to “convey the common areas to the [A]ssociation, turn over the management of Association and allow the members to elect at least majority [sic] of the Board of Administrators of the Association.”

Defendants moved to dismiss the action for failure to state a claim upon which relief can be granted due to the arbitration clause in the Bylaws. Defendants moved, in the alternative, to stay the action pending arbitration and compel arbitration.

The trial court entered an order denying Defendants’ motion to dismiss and alternative motion to stay the action pending arbitration and to compel arbitration on 20 August 2014.

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Defendants' gave timely notice of appeal to this Court.

II. Issues

Defendants argue the trial erred by (1) failing to include required findings in its order; and (2) denying Defendants' motion to dismiss and motion to stay the action and compel arbitration.

III. Review of Order Denying Request for Arbitration

[1] Defendants' appeal is interlocutory. An order or judgment is interlocutory if it does not settle all the pending issues and "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80 (citation omitted), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). The trial court's denial of Defendants' motion to compel arbitration is interlocutory. *Moose v. Versailles Condominium Ass'n*, 171 N.C. App. 377, 381, 614 S.E.2d 418, 422 (2005) (citation omitted).

An interlocutory order is generally not immediately appealable. An exception to this rule exists if the appellant shows the order affects a substantial right, which will be lost if it is not reviewed prior to the issuance of a final judgment. N.C. Gen. Stat. §§ 1-277(a) (2013), 7A-27(b)(1) (2013); *Guilford Cnty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 529, 473 S.E.2d 640, 641 (1996).

This Court has repeatedly held "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted). See *Moose*, 171 N.C. App. at 381, 614 S.E.2d at 422; *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633, 610 S.E.2d 293, 295 (2005); *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002). We acquired jurisdiction to hear Defendants' appeal from the trial court's interlocutory order denying arbitration.

IV. Analysis

[2] Defendants argue, and Plaintiffs concede, the trial court's order lacks the required findings and conclusions to show whether this matter is subject to mandatory arbitration.

A. Standard of Review

In our review of an arbitration agreement, this Court examines "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that

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agreement.” *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citations and internal quotation marks omitted).

In considering the first prong, “[t]he trial court’s findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.” *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (citation omitted), *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). We review *de novo* whether the specific dispute is governed by the arbitration agreement. *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 391, 496 S.E.2d 800, 804 (1998). *See also Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001).

B. Findings of Fact in Trial Court’s Order

The entirety of the trial court’s order denying Defendants’ motion to dismiss and motion to stay and compel arbitration states:

This cause coming on to be heard upon Defendants’ CGR Development Corporation and Carefree Cove Community Association, Inc.’s Motion to Dismiss and Alternative Motion to Stay Action Pending Arbitration and to Compel Arbitration at the August 11, 2014, calendar for the Superior Court of Ashe County, North Carolina, Honorable Richard L. Doughton presiding, and the Court having considered same as well as arguments of counsel for the Plaintiffs and the Defendants in open court, it is

ORDERED, ADJUDGED and DECREED that Defendants’ Motion to Dismiss and Alternative Motion to Stay Action Pending Arbitration and to Compel Arbitration is hereby DENIED.

The order appealed from does not state any grounds for the trial court’s denial of Defendants’ motion to stay and compel arbitration. No findings of fact allow this Court to review and determine whether competent evidence supports the trial court’s denial of Defendants’ motion to stay and compel arbitration. *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580. *See Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002) (holding “[t]he order denying defendants’ motion to stay proceedings [pending arbitration] does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied defendants’ motion”).

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Without setting forth findings of fact, this Court cannot conduct a meaningful review of the conclusions of law and “test the correctness of [the trial court’s] judgment.” *Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988). This Court has repeatedly held “the trial court must state the basis for its decision in denying a defendant’s motion to stay proceedings [pending arbitration] in order for this Court to properly review whether or not the trial court correctly denied the defendant’s motion.” *Steffes v. DeLapp*, 177 N.C. App. 802, 804, 629 S.E.2d 892, 894 (2006). *See Griessel v. Temas Eye Center, P.C.*, 199 N.C. App. 314, 317, 681 S.E.2d 446, 448 (2009) (reversing and remanding trial court’s order where trial court “made no finding of fact as to the existence of a valid agreement to arbitrate”); *United States Trust Co., N.A. v. Stanford Group Co.*, 199 N.C. App. 287, 291, 681 S.E.2d 512, 515 (2009) (reversing and remanding trial court’s order because “the order does not set out the rationale underlying the trial court’s decision to deny defendants’ motion”); *Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 297 (requiring “a determination whether an arbitration agreement exists between the parties”).

The trial court’s order fails to state whether the parties were bound by an arbitration agreement or whether this matter fell within the scope of that agreement. We are unable to determine any basis for the trial court’s ruling.

We are required to remand for entry of an order, which shows the required two-step analysis and includes findings and conclusions necessary to resolve Defendants’ motion. *Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 297. Because of our resolution of this issue, it is unnecessary to address Defendants’ remaining argument.

V. Conclusion

The trial court failed to make any of the requisite findings of fact or conclusions to show: (1) whether the parties had a valid agreement to arbitrate; and, (2) whether this matter falls within the scope of that agreement. The trial court’s denial of Defendants’ motion to dismiss and motion to stay and compel arbitration is reversed. The matter is remanded for further findings and conclusions of law in accordance with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and GEER concur.

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IN THE MATTER OF K.M.M.

No. COA14-918

Filed 7 July 2015

1. Juveniles—delinquency—misdemeanor larceny—sufficiency of evidence

The trial court did not err by denying a juvenile's motion to dismiss charges of misdemeanor larceny and an adjudication of delinquency arising from the theft of a cell phone from a table at a fast food restaurant where defendant contested his identification as the perpetrator. The State presented evidence of the victim, a witness who chased defendant, and several officers, and defendant was found with a spoon from the restaurant as well as two receipts from the restaurant time stamped for around the time of the theft.

2. Juveniles—delinquency—misdemeanor larceny—sufficiency of findings

The trial court made sufficient findings to support adjudicating a juvenile delinquent where it found in the written order that the juvenile had taken an iPhone valued at \$300 from the victim. N.C.G.S. § 7B-2411 does not require any additional findings to support an adjudication of delinquency for misdemeanor larceny.

Appeal by juvenile from adjudication order entered 2 April 2014 by Judge Robert Rader in Wake County Juvenile Court. Heard in the Court of Appeals 20 January 2015.

Michelle FormyDuval Lynch, for respondent.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn H. Shields, for the State.

CALABRIA, Judge.

K.M.M. ("the juvenile") appeals the 2 April 2014 adjudication of the juvenile as delinquent that resulted in a disposition order placing him on probation for nine months. We affirm.

On 16 October 2013 at approximately 5:00 p.m., Alicia Nguyen ("Ms. Nguyen") was eating dinner at a Wendy's restaurant in Raleigh, North Carolina. While she was eating, three young African-American men

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entered the restaurant and sat down at a table behind her. Ms. Nguyen turned around to look at them because they were being rowdy and making rude remarks. Later, two of the young men walked toward the bathroom while the third stood at the food counter facing Ms. Nguyen. The last time Ms. Nguyen looked at her watch, it was 5:30 p.m.

After talking on her iPhone cellular telephone, Ms. Nguyen placed the iPhone on the table. The three young men then surrounded Ms. Nguyen. One of the three young men told his companions to take the iPhone, and the young man standing behind Ms. Nguyen grabbed it off the table. The three then ran from Wendy's with the iPhone, and Ms. Nguyen chased them.

While Ms. Nguyen was chasing the young men, she came into contact with a woman who called 911 at approximately 5:30 p.m. to report the larceny for Ms. Nguyen. Then, Ms. Nguyen came into contact with Patrick Wall ("Mr. Wall"). Ms. Nguyen told Mr. Wall about the theft, and Mr. Wall turned around and drove in the direction Ms. Nguyen had last seen the young men running. Minutes before meeting Ms. Nguyen, Mr. Wall had driven past three young African-American men in that direction. When he saw the three young men again, they ran.

Officer William Edwards ("Officer Edwards") of the Raleigh Police Department ("RPD") investigated the iPhone theft. Ms. Nguyen provided Officer Edwards with a description of the suspects and their clothing. Mr. Wall then informed Officer Edwards where he had last seen the suspects. Officer John Walls ("Officer Walls") detained two individuals that matched the suspects' descriptions.

The juvenile, one of the young men detained, had a Wendy's spoon and two Wendy's receipts in his pockets that were time-stamped 5:29 p.m. and 5:33 p.m. The times on the receipts coincided with the time that the larceny took place at Wendy's. Mr. Wall then observed the individuals at a showup and identified the two individuals as the young men he had previously seen. The juvenile and his companion were taken into custody, and the juvenile was charged with misdemeanor larceny.

On 15 March 2014, a juvenile delinquency hearing was conducted in Wake County District Court. At the hearing, the State presented evidence from Ms. Nguyen, Mr. Wall, Officer Edwards, Officer Walls, RPD Officer D.B. Morland ("Officer Morland"), and RPD Officer Gregory Modetz ("Officer Modetz"). Ms. Nguyen identified the juvenile as one of the young men who stole her iPhone. The juvenile made a motion to dismiss at the close of the State's evidence and at the close of all

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the evidence. The trial court denied both motions, adjudicated the juvenile as delinquent for misdemeanor larceny pursuant to N.C. Gen. Stat. § 14-52 (2013), and placed the juvenile on probation for nine months. The juvenile appeals.

[1] The juvenile first argues that the trial court erred by denying his motion to dismiss and adjudicating him as delinquent. Specifically, the juvenile is not challenging the evidence regarding the elements of larceny. Rather, he contends that there was insufficient evidence that he was the perpetrator of the larceny. We disagree.

“We review a trial court’s denial of a juvenile’s motion to dismiss *de novo*.” *In re J.F.*, ____ N.C. App. ____, ____, 766 S.E.2d 341, 347 (2014) (citation omitted). “Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) of [the] juvenile’s being the perpetrator of such offense.” *Id.* (quoting *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001)) (internal quotation marks omitted). Pursuant to N.C. Gen. Stat. § 14-72(a) (2013), the elements of larceny are: “(1) the wrongful taking and carrying away; (2) of the personal property of another; (3) without his consent; (4) with the intent to deprive permanently the owner thereof.” *State v. Edwards*, 310 N.C. 142, 146, 310 S.E.2d 610, 613 (1984).

“The juvenile’s motion to dismiss should be denied if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the juvenile committed it.” *In re R.N.*, 206 N.C. App. 537, 539, 696 S.E.2d 898, 901 (2010) (citation omitted) (internal quotation marks omitted). “Substantial evidence is that amount of relevant evidence sufficient to persuade a rational juror to accept a particular conclusion.” *Id.* “When reviewing a motion to dismiss a juvenile petition, courts must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference of fact that may be drawn from the evidence.” *In re S.M.S.*, 196 N.C. App. 170, 172, 675 S.E.2d 44, 45 (2009) (citation omitted).

In the instant case, at the juvenile delinquency hearing, the State presented evidence from Ms. Nguyen, Mr. Wall, Officer Edwards, Officer Walls, Officer Morland, and Officer Modetz. Ms. Nguyen identified the juvenile as one of the three young men who stole her iPhone. Ms. Nguyen recognized his face from when she turned around while he was sitting at the table behind her and also when he was standing near the counter facing her at the Wendy’s. While chasing the three young men who stole

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her iPhone, Ms. Nguyen was able to further observe their clothing. She reported to Officer Edwards and Officer Modetz that the juvenile was wearing a red jacket and possibly a hat and that one of the other young men was wearing gray shorts.

Mr. Wall first saw the juvenile and two other young men walking down the middle of the street close to his car. Minutes later, when Mr. Wall learned the perpetrators had run toward the street where he had just seen the young men, Mr. Wall turned around to look for them. He recognized the three young men again, and they ran. Mr. Wall identified the juvenile in a showup the day of the larceny. Mr. Wall also stated that the juvenile was wearing a red jacket, another young man was wearing gray, and one of the young men had a hat.

The arresting officers, Officer Walls and Officer Morland, testified that the juvenile had a Wendy's spoon in his back pocket despite the juvenile's denial that he had been at Wendy's. Additionally, Officer Morland found two Wendy's receipts in the juvenile's back pocket. The receipts were time-stamped 5:29 p.m. and 5:33 p.m., which is evidence that places the juvenile in Wendy's at the time of the iPhone theft. Officer Walls also testified that the juvenile was wearing a red hoodie jacket.

The State presented substantial evidence that the juvenile was the perpetrator of the larceny, and the trial court considered the evidence in the light most favorable to the State. Therefore, the trial court did not err by denying the juvenile's motion to dismiss.

[2] The juvenile next argues that the trial court erred by failing to make sufficient findings of fact to support his delinquency adjudication. We disagree.

"[A]lleged statutory errors are questions of law [and we review them] *de novo*. Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court." *In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012) (quoting *State v. Reeves*, 218 N.C. App. 570, 576, 721 S.E.2d 317, 322 (2012)).

Pursuant to N.C. Gen. Stat. § 7B-2411 (2013),

[i]f the court finds that the allegations in the petition have been proved [beyond a reasonable doubt] as provided in G.S. 7B-2409, the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

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This Court has stated that this statute

does not require the trial court to delineate each element of an offense and state in writing the evidence which satisfies each element, and we recognize that section 7B-2411 does not specifically require that an adjudication order contain appropriate findings of fact, as does section 7B-807, the statute governing orders of adjudication in the abuse, neglect, or dependency context. N.C. Gen. Stat. §§ 7B-807(b), 2411 (2009). Nevertheless, at a minimum, section 7B-2411 requires a court to state in a written order that ‘the allegations in the petition have been proved [beyond a reasonable doubt].’ N.C. Gen. Stat. § 7B-2411.

In re J.V.J., 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011) (internal quotation marks omitted). Although *In re Minor*, an unpublished decision, is not binding authority, we find that it is instructive. See 160 N.C. App. 708, ____ S.E.2d ____, No. COA03-368, 2003 WL 22388748. This Court, in *Minor*, found that the trial court made sufficient findings of fact when it found, “beyond a reasonable doubt: . . . that the juvenile committed the offense as alleged in the petition filed [3 April 2002] alleging common law robbery and is adjudicated delinquent.” 160 N.C. App. at ____, ____ S.E.2d at ____, 2003 WL 22388748, at *2. The petition alleged that the juvenile “unlawfully, willfully, and feloniously did steal, take, and carry [a]way [Juan Gonzales’s personal property] . . . by means of an assault upon him consisting of the forcible and violent taking of the property.” *Id.*

In re Wade is also consistent with disposition of this issue. The order in *Wade* was reversed because, *inter alia*, the trial court failed to state that its adjudication was based upon facts that were proved beyond a reasonable doubt. 67 N.C. App. 708, 711, 313 S.E.2d 862, 864–65 (1984); see also *In re J.J., Jr.*, 216 N.C. App. 366, 372, 717 S.E.2d 59, 64 (2011) (holding that the trial court did not make sufficient findings of fact when, “[i]nstead of addressing any of the allegations in the petition in the blank space [on the adjudication order], the trial court failed to use the space and made no written findings at all”).

In the instant case, as in *Minor*, the trial court found that the allegations had been proved beyond a reasonable doubt and stated so in its written adjudication order. Specifically, the trial court found that it was proved beyond a reasonable doubt “[t]hat on or about the date of 10–16–2013, the juvenile did unlawfully and willfully steal, take, and carry away a White Apple [iP]hone with a pink and gray otter box case,

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the personal property of [Ms.] Nguyen having a value of \$300.00.” N.C. Gen. Stat. § 7B-2411 does not require any additional findings of fact to support the adjudication order. Therefore, the trial court made sufficient findings of fact to support the juvenile’s adjudication of delinquency for misdemeanor larceny.

In conclusion, the trial court heard and considered the State’s evidence, including testimony from Ms. Nguyen, Mr. Wall, and four police officers; narratives of the events at Wendy’s; the location of the young men after the iPhone theft; the description of the young men involved; and the items found on the juvenile when arrested. The trial court made findings of fact that comply with N.C. Gen. Stat. § 7B-2411. This was sufficient evidence of the larceny to support the delinquency adjudication and find that the juvenile was the perpetrator of the larceny. Therefore, the trial court properly denied the juvenile’s motion to dismiss. We affirm the trial court’s denial of the juvenile’s motion to dismiss and the order adjudicating the juvenile as delinquent for misdemeanor larceny.

AFFIRMED.

Chief Judge McGEE and Judge McCULLOUGH concur.

IN THE MATTER OF FRANCES SORRENTINO TAYLOR, DECEASED

No. COA15-159

Filed 7 July 2015

1. Estates—reimbursement claim for funeral expenses—statutory procedure and deadline—clerk of court’s jurisdiction

On appeal from the trial court’s order vacating an order entered by the clerk of court concerning an estate matter, the Court of Appeals overruled petitioner’s argument that the trial court erred by denying her claim for reimbursement of funeral expenses. Petitioner failed to comply with the statutory procedure and deadline for challenging the denial of her claim for funeral expenses, and the clerk of court did not have jurisdiction to hear the claim.

2. Estates—attorney fees—determination by clerk of court

The trial court erred in an estate matter by concluding that the clerk of court lacked authority to review an attorney fees petition

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for reasonableness. The Court of Appeals agreed, however, with the trial court's determination that the clerk's order lacked sufficient findings to support its decision as to the amount of attorney fees that were reasonable. The matter was remanded to the clerk of court.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

Appeal by respondent from order entered 20 October 2014 by Judge Beecher R. Gray in Cumberland County Superior Court. Heard in the Court of Appeals 3 June 2015.

Ward and Smith, P.A., by Alexander C. Dale and Jeremy M. Wilson, for petitioners-appellees.

Sharon A. Keyes for respondent-appellant.

DAVIS, Judge.

Pamela Blackmore ("Blackmore") appeals from the trial court's order vacating a prior order entered by the clerk of court regarding the estate of Frances Sorrentino Taylor ("the Estate"). On appeal, Blackmore argues that the trial court erred in (1) upholding the executor's denial of her request for reimbursement for the expenses from the decedent's funeral; and (2) determining that certain attorneys' fees and expenses incurred by Richard E. Taylor, II ("Taylor") in his capacity as executor were payable by the Estate. After careful review, we affirm in part and vacate and remand in part.

Factual Background

Frances Sorrentino Taylor ("the decedent") died on 5 May 2012 and was survived by her four children: Taylor, Sharon Taylor Dixon ("Dixon"), Frances Lynn Taylor Stoller ("Stoller"), and Blackmore — all beneficiaries of the Estate. The decedent's last will and testament was filed for probate with the Cumberland County Clerk of Court, and Taylor qualified as executor of the Estate on 14 May 2012. Taylor published a notice to creditors on four successive weeks as required by statute on 19 May 2012, 26 May 2012, 2 June 2012, and 9 June 2012, requiring creditors to submit their claims on or before 19 August 2012.

On 7 August 2012, Blackmore submitted a timely claim against the Estate seeking payment of \$18,480.00 for caretaking services she provided to the decedent prior to her death. No other claims were submitted

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by Blackmore at that time. Following the rejection of her claim by Taylor, Blackmore filed a lawsuit (“the Care Services Action”) in Cumberland County Superior Court against the Estate, and Taylor retained Ward and Smith, P.A. (“Ward and Smith”), a law firm, to represent the Estate in that litigation and to provide general assistance regarding the administration of the Estate. The Honorable C. Winston Gilchrist granted summary judgment in the Estate’s favor in the Care Services Action by order entered 23 July 2013, and Blackmore’s action against the Estate was dismissed with prejudice. Subsequently, on 19 November 2013, the Honorable James G. Bell entered an order in that action (1) determining that “[t]he Estate has incurred reasonable attorneys’ fees, costs, and expenses in this matter in the total amount of Thirty-Four Thousand Three Hundred Sixteen and 86/100 Dollars (\$34,316.86)”; (2) concluding that Blackmore’s complaint against the Estate was frivolous and that Blackmore should have known that the complaint “had no justiciable issues”; and (3) ordering Blackmore, pursuant to N.C. Gen. Stat. § 6-21.5, to “pay to the Estate in reimbursement of its reasonable attorneys’ fees, costs, and expenses the total amount of \$500.00.”

On 17 July 2013, Blackmore filed a “Request for Reimbursement from Decedent’s Estate,” seeking \$15,742.30 in reimbursement for funeral expenses that had been paid from Blackmore’s and Dixon’s joint bank account. This account was a deposit account with a right of survivorship that named the decedent, Blackmore, and Dixon as joint owners. On 23 September 2013, Taylor filed a petition asking the Clerk of Court to disallow Blackmore’s request for reimbursement with regard to the funeral expenses and allow him to “move forward with paying final estate administration expenses, making final distributions to beneficiaries, and closing the Estate.” In his petition, Taylor alleged that Blackmore’s reimbursement claim against the Estate was time-barred and stated that “to the extent a formal response is required . . . Taylor hereby notifies Blackmore that the Claim is absolutely and unequivocally rejected, disallowed and denied.” The Estate further noted its understanding that the joint account consisted solely of funds contributed by the decedent.

A proposed final account for the Estate was filed on 2 January 2014, which included disbursements from the Estate to pay legal fees and expenses for which Ward and Smith had submitted invoices. The proposed final account and the attached disbursements report indicated that the total amount of attorneys’ fees and expenses sought was \$91,340.77. This sum included \$16,927.67 in attorneys’ fees and expenses for probate matters, \$35,150.85 in attorneys’ fees and expenses for litigation matters, and \$39,262.22 in attorneys’ fees and expenses that were not

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specifically designated as being for probate-related or litigation-related matters. Blackmore filed an objection to the final account on 31 January 2014, in which she (1) challenged the Estate's failure to reimburse her for the funeral expenses; and (2) asserted that the amount of attorneys' fees charged by Ward and Smith for probate and litigation matters was "excessive."

A hearing was held before Assistant Clerk of Court Cindy Fullerton ("the Clerk") on 13 May 2014. The Clerk entered an order on 9 June 2014 (1) granting reimbursement to Blackmore for the funeral expenses; (2) approving only \$26,211.31 of the requested attorneys' fees as a valid expense of the Estate and denying the remainder; and (3) ordering that a final account be submitted within 30 days of the entry of her order. Taylor, in his capacity as executor, and Stoller, Dixon, and Taylor, as beneficiaries (collectively "Appellees"), appealed the Clerk's order to Cumberland County Superior Court. Simultaneously, the Clerk sealed the records containing detailed invoices from the Estate's counsel based on the fact that confidential attorney-client information was contained therein.

The matter came on for hearing before the Honorable Beecher R. Gray on 22 September 2014. On 20 October 2014, Judge Gray entered an order vacating the Clerk's order, denying Blackmore's claim for reimbursement for the funeral expenses, and ordering that the full amount of the legal fees and expenses for which payment had been sought be paid by the Estate. The trial court further ordered Taylor to submit a final account to the Clerk within 45 days of the entry of its order. Blackmore filed a timely appeal to this Court.

Analysis

Upon appeal to superior court of an order entered by a clerk of court concerning an estate matter, the superior court's review is limited solely to determining the following:

- (1) Whether the findings of fact are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of fact.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d) (2013). "The standard of review in this Court is the same as that in the Superior Court." *In re Estate of Monk*, 146 N.C. App. 695, 697, 554 S.E.2d 370, 371 (2001), *disc. review denied*,

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355 N.C. 212, 559 S.E.2d 805 (2002). “Errors of law are reviewed *de novo*.” *In re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 693, 652 S.E.2d 262 (2007).

On appeal to this Court, Blackmore argues that the trial court “went beyond its jurisdictional authority” in setting aside the Clerk’s order. Specifically, she contends that the trial court erred, and exceeded its limited power of review, in vacating the Clerk’s order regarding both her funeral expenses claim and the amount of the legal fees and expenses payable by the Estate. We address each of these issues in turn.

I. Claim for Reimbursement of Funeral Expenses

[1] Blackmore first argues that the trial court erred in denying her claim for reimbursement of the funeral expenses because (1) the court improperly replaced the Clerk’s findings and conclusions on this issue with its own; and (2) the claim was supported by evidence of record and authorized by applicable law.

It is well established that a clerk of court has original jurisdiction in probate matters. *See* N.C. Gen. Stat. § 28A-2-1 (2013) (“The clerk of superior court of each county, ex officio judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, estate proceedings as provided in G.S. 28A-2-4.”). When a party appeals a judgment or order entered by the clerk of court to the superior court, “the trial court sits as an appellate court.” *In re Estate of Mangum*, 212 N.C. App. 211, 212, 713 S.E.2d 18, 19-20 (2011). Where sufficient evidence exists to support the clerk of court’s findings, the trial judge cannot substitute his own findings for those of the clerk. *In re Estate of Swinson*, 62 N.C. App. 412, 415, 303 S.E.2d 361, 363 (1983) (explaining that superior court hearing on appeal from clerk’s order in estate matter “is not a *de novo* hearing. . . . since its jurisdiction is derivative”).

In the present case, the trial court concluded that the Clerk erred in ordering the Estate to pay \$15,742.30 in funeral expenses because the claim was time-barred. Specifically, the trial court ruled that Blackmore’s funeral expenses claim did not comply with N.C. Gen. Stat. § 28A-19-3, which governs the presentation of claims against an estate and sets out the applicable deadline for submitting such claims. The trial court also ruled that the funeral expenses claim was likewise time-barred under N.C. Gen. Stat. § 28A-19-16 because Blackmore failed to commence a civil action within three months of receiving notice from Taylor of his rejection of her claim. We agree with the trial court on both counts.

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Under N.C. Gen. Stat. § 28A-19-3, claims against a decedent's estate that arise at or after the death of the decedent that are not based on a contract with the personal representative become "forever barred against the estate" if not brought within six months of the date on which the claim arose. N.C. Gen. Stat. § 28A-19-3(b)(2) (2013). Here, the funeral expenses were paid in May of 2012, and Blackmore did not file her claim seeking reimbursement until July of 2013 — 14 months after the claim arose. As such, Blackmore's claim was submitted approximately eight months after the deadline for bringing claims against the Estate had elapsed.

Blackmore attempts to distinguish her "request for reimbursement" from a claim governed by the limitations period set forth in N.C. Gen. Stat. § 28A-19-3 by arguing that funeral expenses are considered an obligation of an estate under N.C. Gen. Stat. § 28A-19-8(a), the statute addressing the funeral expenses of a decedent. Based on this argument, she contends that because (1) she was authorized to bind the Estate for funeral expenses as the decedent's health care power of attorney; and (2) the Estate is "primarily liable" for the funeral expenses of the decedent pursuant to N.C. Gen. Stat. § 28A-19-8(a), the six-month deadline for the presentation of claims set out in N.C. Gen. Stat. § 28A-19-3(b)(2) does not apply. We are not persuaded.

Article 19 of Chapter 28A of our General Statutes, which addresses claims against an estate, does not treat debts for funeral expenses separately from other debts of an estate with regard to the statutory requirements of how and when claims for payment of such debts must be made. The statutory provision addressing funeral expenses as an obligation of the estate is contained within the section of Chapter 28A entitled "Claims Against the Estate," and N.C. Gen. Stat. § 28A-19-6(a), which governs the order in which claims are paid, classifies funeral expenses up to \$3,500.00 as a class two *claim*, receiving preferential treatment over most other types of claims, and any additional funeral expenses over \$3,500.00 as allowable but without priority over other claims.

Thus, while funeral expenses are clearly considered a valid obligation of an estate, neither Blackmore's brief nor our own research reveals any statutory support for her contention that funeral debts are either (1) deemed automatically presented to the estate (as is the case with actions pending against a decedent at the time of his death where the personal representative is substituted for the decedent as a party under N.C. Gen. Stat. § 28A-19-1(c)); or (2) exempt from the limitations period contained in N.C. Gen. Stat. § 28A-19-3(b) (as are tax claims by the state and federal governments). As such, the trial court did not err in

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concluding that Blackmore's claim seeking reimbursement for funeral expenses was time-barred under N.C. Gen. Stat. § 28A-19-3. Moreover, contrary to Blackmore's assertions, this determination was within the trial court's scope of review as it was expressly authorized to determine whether the Clerk's order was legally correct. *See* N.C. Gen. Stat. § 1-301.3(d) ("Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining . . . [w]hether the order or judgment is consistent with the conclusions of law and applicable law.").

In addition, the Clerk lacked jurisdiction to consider Blackmore's claim for reimbursement of funeral expenses in the first place because once the claim was rejected by Taylor, Blackmore's only recourse — pursuant to N.C. Gen. Stat. § 28A-19-16 — was to file a civil action. As this Court explained in *In re Estate of Neisen*, 114 N.C. App. 82, 440 S.E.2d 855, *disc. review denied*, 336 N.C. 606, 447 S.E.2d 397 (1994),

Section 28A-19-16 provides that a claimant whose claim has been denied by the personal representative, and which claim is not referred to a third party for resolution, "must, within three months, after due notice in writing of such rejection, . . . commence an action for the recovery thereof, or be forever barred from maintaining an action thereon."¹ Rule 3 of the North Carolina Rules of Civil Procedure is entitled "Commencement of action" and provides: "A civil action is commenced by filing a complaint with the court [or by the issuance of a summons under certain circumstances.]" N.C.G.S. § 1A-1, Rule 3 (1990). Section 28A-19-16 clearly provides that the only way to preserve a rejected claim is by commencing an action, i.e., filing a complaint, within three months of the notice of rejection. . . .

Furthermore, the Clerk of Court has no jurisdiction to hear claims which are "‘justiciable matters of a civil nature,’ original general jurisdiction over which is vested in the trial division. G.S. 7A-240." *Ingle v. Allen*, 53 N.C. App. 627, 628-29, 281 S.E.2d 406, 407 (1981). The claim in the present case is just such a claim.

Id. at 85-86, 440 S.E.2d at 858.

1. N.C. Gen. Stat. § 28A-19-16 was subsequently amended to include language addressing contingent or unliquidated claims, which are not at issue in this case. *See* 2011 N.C. Sess. Laws 1346, 1396, ch. 344, § 4. The above-quoted language, however, remains in the current version of § 28A-19-16.

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Like the claimant in *Neisen*, Blackmore failed to file a civil action at all — much less do so within three months of the denial of her claim by Taylor. Consequently, because (1) she did not comply with the statutory procedure and accompanying deadline for challenging the denial of her claim for funeral expenses; and (2) the Clerk did not have jurisdiction to hear Blackmore’s claim, Blackmore’s argument on this issue is overruled.

II. Attorneys’ Fees and Expenses

[2] Blackmore next argues that the trial court erred in vacating the Clerk’s findings of fact and conclusions of law concerning the amount of attorneys’ fees (and accompanying expenses) that were deemed allowable as an expense of the Estate. In her order, the Clerk noted that Blackmore had objected to both (1) the \$34,316.86 in attorneys’ fees awarded to Ward and Smith in the litigation of the Care Services Action; and (2) the \$44,703.23 in attorneys’ fees incurred in various other estate administration matters. The Clerk determined, however, that the attorneys’ fees incurred in the litigation of the Care Services Action and awarded in that action were not before her. The Clerk then stated that she had the authority to review attorneys’ fees for reasonableness before permitting the payment of any such fees from estate assets and subsequently concluded that only attorneys’ fees and expenses in the amount of \$26,211.31 were allowable as an expense of the Estate.

In its 20 October 2014 order, the trial court ruled that the Clerk’s decision to allow only this portion of the requested attorneys’ fees constituted error. Specifically, the trial court determined that the Estate had already incurred \$84,492.08 in attorneys’ fees and expenses “for legal services in representing the Estate in connection with administration of the Estate and with defense against Blackmore’s claims in the Blackmore Litigation,” and concluded, in pertinent part, as follows:

The Clerk lacks statutory authority or jurisdiction to establish a “reasonable and customary” standard for review of legal fees and expenses incurred by the Estate. Even if such a standard existed, which is denied, the June 9 Order is in error because it fails to apply its own “reasonable and customary” standard in any finding of fact or conclusion of law. . . . The ultimate outcome of the June 9 Order reducing the legal fees and expenses to be paid by the Estate is without support in the evidence, the findings of fact, or the conclusions of law, which also renders the June 9 Order in error.

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. . . .

All legal fees and expenses incurred by the Estate with Ward and Smith, P.A. are debts of the Estate, and the Executor should be reimbursed for any legal fees and expenses advanced by him on behalf of the Estate from his own money consistent with [N.C. Gen. Stat. §] 28A-13-3(a)(14).

The trial court therefore ordered that (1) all legal fees and expenses for which reimbursement was sought be paid by the Estate; and (2) the Clerk proceed to close the Estate upon Taylor's submission of a proper and accurate final account.

The primary issue raised by the parties in this appeal is whether a clerk of court has the authority to review for reasonableness the legal fees incurred by an executor on behalf of the estate or, alternatively, whether the clerk's authority is limited to the ministerial task of simply determining whether the entries in a submitted account reflect the actual receipts and disbursements made by the executor (consistent with the clerk's statutory responsibility for auditing the annual and final accounts of the estate under N.C. Gen. Stat. §§ 28A-21-1 and 28A-21-2). In analyzing this issue, we first note the absence of a statutory provision specifically addressing the *payment* of legal fees to an attorney who is hired to assist in the administration of an estate pursuant to N.C. Gen. Stat. § 28A-13-3(19), the statute that authorizes a personal representative to "employ persons, including attorneys . . . to advise or assist the personal representative in the performance of the personal representative's administrative duties."

In contrast, N.C. Gen. Stat. § 28A-23-4 explicitly sets forth the procedure for allowing the payment of attorneys' fees by an estate where the individual serving as the personal representative of the estate is licensed to practice law and provides legal services himself to the estate. N.C. Gen. Stat. § 28A-23-4 states as follows:

The clerk of superior court, in the discretion of the clerk of superior court, is authorized and empowered to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed the attorney as such representative, collector or public administrator) where such attorney in behalf of the estate the attorney represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which

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would reasonably justify the retention of legal counsel by any such representative, collector or public administrator not licensed to practice law.

N.C. Gen. Stat. § 28A-23-4 (2013). Because there is not an analogous provision expressly setting out the clerk of court's authority to award attorneys' fees incurred where, as here, a non-attorney personal representative retains counsel to assist him in estate administration matters, Appellees argue that a clerk is permitted to do nothing more than simply audit the account of the estate to ensure the disbursement of attorneys' fees and related expenses are accurately reflected and has no authority to assess the reasonableness of such fees and expenses.

In making this argument, Appellees rely on *In re Vogler Realty, Inc.*, 365 N.C. 389, 722 S.E.2d 459 (2012). In *Vogler*, our Supreme Court addressed the issue of whether a clerk possesses the authority to determine the reasonableness of attorneys' fees paid to a trustee-attorney in a foreclosure proceeding. *Id.* at 395-96, 722 S.E.2d at 464. The Court emphasized that, in general, clerks of court have "limited jurisdictional authority" and "cannot perform functions involving the exercise of judicial discretion in the absence of statutory authority." *Id.* at 395, 722 S.E.2d at 464. In determining that clerks lacked the authority to examine the reasonableness of attorneys' fees in the context of foreclosure proceedings, the Court contrasted the limited power of clerks in the realm of *foreclosure* with their greater statutory authority in the area of *estates*. Specifically, the Court explained that

[i]n other contexts, when the legislature has intended for the clerk to possess discretionary authority over commissions and attorney's fees, it specifically has set forth this authority, prefaced with the use of "may" or "in the discretion of." See N.C.G.S. § 35A-1116(a) (2009) (guardianship); N.C.G.S. §§ 28A-3-3, 23-4 (2009) (*estates*); see also *Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 345, 347, 75 S.E.2d 151, 153, 154 (1953) (stating that, under our prior estates statute, the allowance of commissions to an executor required the exercise of judicial discretion by the clerk of court). However, such a grant of authority is completely absent in section 45-21.33. Moreover, the audit itself is ministerial, rather than discretionary in nature, "because the law requires [the clerk] to do [it] without any application or request." *Bryan v. Stewart*, 123 N.C. 92, 97, 31 S.E. 286, 287 (1898); see also *State ex. rel. Owens v. Chaplin*, 228 N.C. 705, 711, 47 S.E.2d 12, 16

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(1948) (describing a ministerial duty as “a simple and definite duty imposed by law regarding which nothing [is] left to [the clerk’s] discretion”). . . . Therefore, during the audit the clerk is not authorized to review the trustee-attorney’s payment of attorney’s fees to himself for reasonableness, as this action would involve an improper exercise of judicial discretion. Instead, the clerk’s audit pursuant to section 45-21.33(a) and (b) is a ministerial act that is limited to determining merely whether the entries in the report reflect the actual receipts and disbursements made by the trustee in the absence of a grant of original jurisdiction to determine additional matters.

Id. at 395-96, 722 S.E.2d at 464 (select internal citations and quotation marks omitted and emphasis added).

Appellees contend that the same result should apply here. However, based on our careful examination of the statutory provisions establishing a clerk’s authority in estate matters and case law from our Supreme Court interpreting these provisions, we cannot agree.

Pursuant to N.C. Gen. Stat. § 28A-23-3(d)(1), clerks of court have the authority to allow “*reasonable sums for necessary charges and disbursements incurred in the management of the estate.*” N.C. Gen. Stat. § 28A-23-3(d)(1) (2013) (emphasis added). The Supreme Court has expressly recognized that attorneys’ fees incurred in the administration of an estate fall within this statutory provision. *Phillips v. Phillips*, 296 N.C. 590, 602, 252 S.E.2d 761, 769 (1979).² In *Phillips*, our Supreme Court stated that the “[c]osts of administration [of an estate] include the executor’s commissions and ‘reasonable sums for necessary charges and disbursements incurred in the management of the estate.’ G.S. 28A-23-3. *Reasonable attorneys’ fees come within the latter item.*” *Id.* (emphasis added). The Court further explained that “[a]s a judge of probate, the clerk has supervised the administration of the estate from the beginning and presumably will have some idea of the value of the service which the executor and his attorney have rendered the estate.” *Id.* at 602, 252 S.E.2d at 769. Therefore, *Phillips* and *Vogler*, when read in conjunction with N.C. Gen. Stat. § 28A-23-3(d)(1), compel the conclusion that clerks do possess the authority to review attorneys’ fees petitions for reasonableness pursuant to their power to allow reasonable sums

2. We note that *Phillips* was decided by our Supreme Court after the enactment of Chapter 28A of the North Carolina General Statutes in 1973. *See* 1973 N.C. Sess. Laws 629, 629-674, ch. 1329, § 1-5.

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for necessary charges and disbursements incurred in the management of an estate.³

Finally, although we conclude that the trial court erred in ruling that the Clerk lacked the authority to review Taylor's attorneys' fees petition for reasonableness, we agree with the trial court's determination that the Clerk's order contained insufficient findings to support its decision as to the amount of attorneys' fees that were reasonable and therefore allowable as an expense of the Estate. We therefore direct the trial court to remand this matter to the Clerk so that she may make the requisite findings of fact and conclusions of law to support her determination concerning the amount of attorneys' fees and expenses allowable as a reasonable charge or disbursement necessary to the management of the Estate.⁴

See N.C. Gen. Stat. § 1-301.3(b) (requiring clerk in estate matters to "determine all issues of fact and law. . . . [and] enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment").

Conclusion

For the reasons stated above, we affirm in part and vacate and remand in part.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges STEELMAN and HUNTER, JR. concur.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

3. While not the basis for our ruling on this issue, we observe that our holding appears to be consistent with the North Carolina Clerk of Superior Court Procedures Manual issued by the University of North Carolina School of Government. The manual states that while "[t]here is no statutory provision governing the payment of attorney fees for an attorney representing a personal representative or . . . hired by the personal representative in the administration of the estate. . . . [a] clerk may allow these fees as a 'necessary' charge incurred in the management of the estate under G.S. § 28A-23-3(d)(1)." N.C. Clerk of Superior Court Procedures Manual, 75.7 (2012). The manual then directs clerks to utilize a procedure for assessing the reasonableness of such fees similar to that used when reviewing a petition for attorneys' fees pursuant to N.C. Gen. Stat. § 28A-23-4. *See id.*

4. In conducting the reasonableness inquiry, the effect of N.C. Gen. Stat. § 28A-23-3(a) should be considered.

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JOHN DOE 200, PLAINTIFF

v.

DIOCESE OF RALEIGH, MICHAEL F. BURBIDGE, BISHOP OF THE DIOCESE OF
RALEIGH, AND EDGAR SEPULVEDA, DEFENDANTS

No. COA14-1396

Filed 7 July 2015

1. Appeal and Error—interlocutory orders and appeals—First Amendment—religion—immediate appeal

The Court of Appeals had jurisdiction to consider defendants' appeal from an interlocutory order for claims that would require a civil court to delve into issues concerning "the Roman Catholic Church's religious doctrine, practices, and canonical law" in order to resolve the controversy between the parties. When First Amendment rights are threatened or impaired by an interlocutory order, immediate appeal is appropriate.

2. Jurisdiction—subject matter—negligent supervision of priest—negligent infliction of emotional distress—sexually transmitted disease testing—ecclesiastical matters—motion to dismiss

Plaintiff's claims for negligent supervision and negligent infliction of emotional distress (NIED) based upon the Diocese defendants' allegedly negligent supervision of a priest could be resolved through the application of neutral principles of law and, therefore, were not barred by the First Amendment. Plaintiff's claims for negligence and NIED based on the Diocese defendants' failure to compel the priest to undergo sexually transmitted disease testing, conversely, would entangle the court in ecclesiastical matters and were dismissed under Rule 12(b)(1).

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

Appeal by defendants Diocese of Raleigh and Michael F. Burbidge, Bishop of the Diocese of Raleigh, from order entered 2 June 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 20 May 2015.

Copeley Johnson Groninger PLLC, by Leto Copeley, and Jeff Anderson & Associates, P.A., by Gregg Meyers, pro hac vice, for plaintiff-appellee.

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Poyner Spruill LLP, by Andrew H. Erteschik, Charles F. Powers, III, and Thomas K. Lindgren, for defendants-appellants Diocese of Raleigh and Michael F. Burbidge, Bishop of the Diocese of Raleigh.

DAVIS, Judge.

The Diocese of Raleigh (“the Diocese”) and Michael F. Burbidge, the Bishop of the Diocese (“Bishop Burbidge”) (collectively “the Diocese Defendants”) appeal from the trial court’s 2 June 2014 order granting in part and denying in part their motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On appeal, the Diocese Defendants argue that the adjudication of the remaining claims asserted against them would require a North Carolina civil court to impermissibly entangle itself in ecclesiastical matters and that these claims must therefore be dismissed for lack of subject matter jurisdiction based on the First Amendment. After careful review, we affirm in part and reverse in part.

Factual Background

On 12 November 2013, John Doe 200¹ (“Plaintiff”) filed a complaint in Wake County Superior Court against the Diocese, Bishop Burbidge, and Edgar Sepulveda (“Sepulveda”). In his complaint, Plaintiff alleged that Sepulveda, a priest who was incardinated to the Diocese, sexually assaulted him on multiple occasions beginning in May of 2009 when Plaintiff was sixteen years old.² Plaintiff asserted that he was involved in youth activities at Sepulveda’s parish and that Sepulveda had begun to “cultivate a special relationship with [him], and began to groom him for sexual assault by exhibiting frequent physical contact with [him] . . . through hugs and embraces.” Plaintiff alleged that the first sexual assault occurred when Sepulveda invited Plaintiff to spend the night at his home and that the second incident took place when Sepulveda, “using his stature as a priest,” secured an invitation to spend the night at Plaintiff’s home.

Plaintiff’s complaint stated that he reported the sexual abuse in September of 2009, and, in response, Sepulveda was suspended by the

1. John Doe 200 is a pseudonym used by Plaintiff to protect his privacy.

2. Plaintiff is currently an active member of the military and asserts that the applicable limitations period governing his claims was tolled by the federal Servicemembers’ Civil Relief Act, 50 U.S.C.A. App. § 526. The timeliness of Plaintiff’s claims is not at issue in this appeal.

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Diocese. Plaintiff alleged that when he subsequently requested that the Diocese Defendants compel Sepulveda to undergo testing to determine whether he carried a sexually transmitted disease (“STD”) that could have been passed to Plaintiff, this request was refused.

In his complaint, Plaintiff asserted claims for assault and battery against Sepulveda and claims for negligence, negligent infliction of emotional distress (“NIED”), and vicarious liability against the Diocese Defendants. Specifically, Plaintiff alleged that the Diocese Defendants failed to (1) protect Plaintiff from the danger they knew or should have known was posed by Sepulveda by negligently supervising him; (2) educate Plaintiff “about the proper boundaries a priest should observe as to physical touch”; and (3) compel Sepulveda to undergo STD testing and provide the results of such testing to Plaintiff. Plaintiff’s NIED claims were likewise based on the Diocese Defendants’ failure to protect him from Sepulveda and their refusal to require him to submit to STD testing. The vicarious liability claim against the Diocese Defendants was grounded in theories of respondeat superior, apparent agency, and the non-delegable duty doctrine. Plaintiff sought in his prayer for relief compensatory damages, punitive damages, and injunctive relief in the form of an order compelling Sepulveda to undergo STD testing.

On 24 January 2014, the Diocese Defendants filed a motion to dismiss Plaintiff’s claims against them based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim upon which relief can be granted under Rule 12(b)(6). In support of their motion, the Diocese Defendants filed an affidavit from Bishop Burbidge setting out basic tenets from the Code of Canon Law, “the universal law of the Roman Catholic Church.”³ In his affidavit, Bishop Burbidge explained that the role of priests, the relationship between a bishop and his priests, and the procedure for removing a priest from his clerical office are all informed by the Code of Canon Law. Bishop Burbidge further discussed policies and procedures that the Roman Catholic Church has enacted to ensure the protection of minors from sexual abuse.

3. “In considering a motion to dismiss for lack of subject matter jurisdiction, it is appropriate for the court to consider and weigh matters outside of the pleadings.” *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 326, 611 S.E.2d 853, *cert. denied*, 546 U.S. 819, 163 L.Ed.2d 59 (2005); *see Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) (“Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.” (citation, quotation marks, and brackets omitted)).

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The Diocese Defendants' motion came on for hearing before the Honorable Donald W. Stephens on 27 May 2014. On 2 June 2014, Judge Stephens entered an order dismissing (1) Plaintiff's vicarious liability claim; and (2) the portion of Plaintiff's negligence claim premised on the Diocese Defendants' failure to educate Plaintiff as to the proper boundaries concerning physical contact between priests and parishioners.⁴ The trial court's order denied the Diocese Defendants' motion as to the remaining claims asserted against them in the complaint. The Diocese Defendants timely appealed to this Court.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we note that the order from which the Diocese Defendants are appealing is interlocutory as it did not dispose of all of Plaintiff's claims.⁵ See *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) ("An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." (citation and quotation marks omitted)). While a right to immediate appeal does not generally lie from an interlocutory order, appellate review of an interlocutory order is permissible if (1) the order constitutes a final determination as to some, but not all, of the claims between the parties, and the trial court certifies the order for immediate appeal pursuant to Rule 54(b); or (2) "the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment." *Keese v. Hamilton*, ___ N.C. App. ___, ___, 762 S.E.2d 246, 249 (2014).

As noted above, the Diocese Defendants moved for dismissal of Plaintiff's complaint in the trial court on two grounds: (1) lack of subject matter jurisdiction under Rule 12(b)(1); and (2) failure to state a valid claim for relief under Rule 12(b)(6). The Diocese Defendants concede

4. Judge Stephens' order did not explicitly state whether his dismissal of the two above-referenced claims was based on Rule 12(b)(1) or Rule 12(b)(6). However, his order stated that the two claims were "without any legal basis and . . . therefore dismissed with prejudice," suggesting that these two claims failed to state a valid claim for relief under Rule 12(b)(6). Moreover, his comments contained in the hearing transcript likewise lead to the conclusion that his dismissal of these claims was based on Rule 12(b)(6) rather than Rule 12(b)(1).

5. In addition to the remaining claims against the Diocese Defendants, all of Plaintiff's claims against Sepulveda are still pending in the trial court. Those claims are not at issue in this appeal.

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that the trial court's partial denial of their motion to dismiss under Rule 12(b)(6) "does not involve immediately appealable issues." *See Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 629, 347 S.E.2d 369, 373 (1986) ("A ruling denying a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is ordinarily a nonappealable interlocutory order."). Therefore, the question of whether Plaintiff's complaint was sufficient to state a valid claim for relief against the Diocese Defendants under Rule 12(b)(6) as to those claims left undisturbed by the trial court's order is not before us.

However, the Diocese Defendants do contend that appellate jurisdiction exists as to their appeal of the trial court's ruling on their Rule 12(b)(1) motion. It is this aspect of the trial court's ruling that forms the entire basis for this appeal.

It is well settled that an assertion that a civil court is precluded on First Amendment grounds from adjudicating a claim constitutes a challenge to that court's subject matter jurisdiction. *Tubiolo*, 167 N.C. App. at 326, 605 S.E.2d at 163; *see also Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (explaining that "[s]ubject matter jurisdiction refers to the power of the court to deal with the kind of action in question" and is conferred either statutorily or constitutionally).

In *Harris v. Matthews*, 361 N.C. 265, 643 S.E.2d 566 (2007), our Supreme Court addressed whether there is appellate jurisdiction over a trial court's interlocutory order denying a church's motion to dismiss for lack of subject matter jurisdiction based on the assertion that "a civil court action cannot proceed [against a church defendant] without impermissibly entangling the court in ecclesiastical matters." *Id.* at 270, 643 S.E.2d at 569. The Supreme Court concluded that the order was immediately appealable because the defendant would be "irreparably injured if the trial court becomes entangled in ecclesiastical matters from which it should have abstained." *Id.* at 271, 643 S.E.2d at 570. In so holding, the Court noted that "[t]he constitutional prohibition against court entanglement in ecclesiastical matters is necessary to protect First Amendment rights identified by the 'Establishment Clause' and the 'Free Exercise Clause'" and that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 270, 643 S.E.2d at 569 (citation and quotation marks omitted).

As in *Harris*, the Diocese Defendants in the present case contend that the claims asserted against them in Plaintiff's complaint would require a civil court to delve into issues concerning "the Roman Catholic Church's religious doctrine, practices, and canonical law" in order to

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resolve the controversy between the parties — an intrusion that is prohibited by the First Amendment. *See id.* at 275, 643 S.E.2d at 572 (“[W]hen a party challenges church actions involving religious doctrine and practice, court intervention is constitutionally forbidden.”). Consequently, we conclude that we have jurisdiction over this appeal and proceed to address the merits of the Diocese Defendants’ arguments. *See id.* at 270, 643 S.E.2d at 569-70 (“[W]hen First Amendment rights are threatened or impaired by an interlocutory order, immediate appeal is appropriate.”).

II. Subject Matter Jurisdiction**A. First Amendment’s Prohibition Against Excessive Entanglement in Ecclesiastical Matters**

[2] The Establishment Clause and the Free Exercise Clause of the First Amendment prohibit any “law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. “As applied to the states through the Fourteenth Amendment, the First Amendment also restricts action by state governments and the servants, agents and agencies, of state governments.” *Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993) (citation and quotation marks omitted). As such, the civil courts of North Carolina are prohibited “from becoming entangled in ecclesiastical matters” and have no jurisdiction over disputes which require an examination of religious doctrine and practice in order to resolve the matters at issue. *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 810 (2011); *see W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (“The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies . . .” (citation and quotation marks omitted)).

An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.

E. Conference of Original Free Will Baptists of N.C. v. Piner, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966) (citation and quotation marks

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omitted), *overruled in part on other grounds by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973). This Court has previously explained that “[t]he prohibition on judicial cognizance of ecclesiastical disputes is founded upon both establishment and free exercise clause concerns” because (1) by hearing religious disputes, a civil court could influence associational conduct, “thereby chilling the free exercise of religious beliefs”; and (2) “by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks ‘establishing’ a religion.” *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 492, 598 S.E.2d 667, 670 (2004) (citation omitted).

In *Harris*, our Supreme Court provided a comprehensive articulation of the considerations a civil court must take into account when determining whether it may adjudicate claims involving religious entities. *Harris*, 361 N.C. at 271-74, 643 S.E.2d at 570-72. The plaintiffs in *Harris*, members of the congregation of Saint Luke Missionary Baptist Church, filed a civil complaint on behalf of the church based on their contention that the church’s interim pastor had misappropriated church funds. *Id.* at 268, 643 S.E.2d at 568. In their complaint, the plaintiffs asserted claims for conversion of funds, breach of fiduciary duty, and civil conspiracy against the interim pastor, the church secretary, and the chairman of the board of trustees. *Id.* The pastor moved to dismiss the claims against him for lack of subject matter jurisdiction on First Amendment grounds, and the trial court denied his motion. The Supreme Court held that the First Amendment prohibited the adjudication of the plaintiffs’ claims, which were predicated on allegations that the pastor had “usurped the governmental authority of the church’s internal governing body.” *Id.* at 272, 643 S.E.2d at 571.

Plaintiffs do not ask the court to determine who constitutes the governing body of Saint Luke or whom that body has authorized to expend church resources. Rather, plaintiffs argue Saint Luke is entitled to recover damages from defendants because they breached their fiduciary duties by improperly using church funds, which constitutes conversion. Determining whether actions, including expenditures, by a church’s pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church’s view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management. Because a church’s

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religious doctrine and practice affect its understanding of each of these concepts, seeking a court's review of the matters presented here is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs. None of these issues can be addressed using neutral principles of law.

Here, . . . in order to address plaintiffs' claims, the trial court would be required to interpose its judgment as to both the proper role of these church officials and whether each expenditure was proper in light of Saint Luke's religious doctrine and practice, to the exclusion of the judgment of the church's duly constituted leadership. This is precisely the type of ecclesiastical inquiry courts are forbidden to make.

Id. at 273, 643 S.E.2d at 571.

Thus, although *Harris* — unlike the present case — involved an internal church governance dispute, the principles set out therein concerning the limitations placed by the First Amendment on the subject matter jurisdiction of civil courts to adjudicate claims against religious entities are equally applicable here. “The dispositive question is whether resolution of the legal claim[s] requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim.” *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998).

Therefore, we must examine each of Plaintiff's remaining causes of action against the Diocese Defendants in order to determine whether its adjudication would require “an impermissible analysis by the court based on religious doctrine or practice.” *Antioch United Holy Church*, 214 N.C. App. at 511, 714 S.E.2d at 810; *see Harris*, 361 N.C. at 274, 643 S.E.2d at 572 (explaining that once it becomes clear “that no neutral principles of law exist[] to resolve plaintiffs' lawsuit, continued involvement by the trial court [is] unnecessary and unconstitutional”). Because we review *de novo* a trial court's ruling on a motion to dismiss for lack of subject matter jurisdiction, we consider the matter anew and freely substitute our own judgment for that of the trial court. *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010).

B. Negligence Claims

1. Negligent Supervision

Plaintiff's primary claim against the Diocese Defendants seeks to impose liability against them on a theory of negligent supervision. Plaintiff asserts in his complaint that the Diocese Defendants "knew, or should have known, that children needed to be protected from Sepulveda" because of his "sexual interest in children" and "failed to protect [Plaintiff] from the dangers" Sepulveda presented.

North Carolina law recognizes a cause of action for negligent supervision against an employer where the plaintiff establishes the existence of the following elements:

(1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision, . . . ; and (4) that the injury complained of resulted from the incompetency proved.

Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (citation, quotation marks, and emphasis omitted)); *see Wilkerson v. Duke Univ.*, ___ N.C. App. ___, ___, 748 S.E.2d 154, 160 (2013) (explaining that such claims require proof "that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency" (citation omitted)). Our Supreme Court has recognized that with regard to such claims, the employer's liability for the injury caused by his employee is "entirely independent of the employer's liability under the doctrine of *respondeat superior*." *Braswell v. Braswell*, 330 N.C. 363, 373, 410 S.E.2d 897, 903 (1991) (citation omitted).⁶

6. At oral argument, counsel for the Diocese Defendants referenced our Supreme Court's decisions in *Bridges v. Parrish*, 366 N.C. 539, 742 S.E.2d 794 (2013), and *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 626 S.E.2d 263 (2006), in contending that the adjudication of this claim would violate the First Amendment. However, neither of those two cases involve a negligent supervision claim against an employer. Nor do they address issues relating to the civil liability of religious entities or otherwise implicate the First Amendment in any respect. Therefore, *Bridges* and *Stein* lack relevance to the limited subject matter jurisdiction issue raised in this appeal.

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The Diocese Defendants contend that the trial court should have dismissed Plaintiff's negligent supervision claim under Rule 12(b)(1) because that claim cannot be resolved without excessively entangling a civil court in the examination and interpretation of church doctrine and practice. Specifically, they assert that Plaintiff's negligent supervision claim offends the First Amendment because it "directly asks the trial court — and ultimately a jury — to decide whether the Church's canon law-based doctrines and practices are 'reasonable.'"

At the outset, we observe that no clear consensus exists among courts in other jurisdictions on the issue of whether civil courts may adjudicate tort claims asserting that a religious organization was negligent in its supervision of a cleric who is accused of sexual misconduct or other tortious conduct against a third party. A number of courts have held that exercising jurisdiction over such claims does not offend the First Amendment because a religious organization's liability under such circumstances may be determined through the application of neutral principles of tort law. *See Malicki v. Doe*, 814 So.2d 347, 364 (Fla. 2002) ("The core inquiry in determining whether the Church Defendants are liable will focus on whether they reasonably should have foreseen the risk of harm to third parties. This is a neutral principle of tort law. Therefore, based on the allegations in the complaint, we do not foresee 'excessive' entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law."); *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (concluding that First Amendment did not bar plaintiff's negligent supervision claim because review of that claim "only requires the court to determine if the Church Defendants knew of [minister's] inappropriate conduct yet failed to protect third parties from him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards."); *see also Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1242 (Miss. 2005) (holding that claim against church for its negligent supervision of priest accused of sexually abusing minors was not jurisdictionally barred and "reject[ing] the notion that the First Amendment provides, or was intended to provide, blanket civil immunity to churches for violation of recognized standards of conduct which results in reasonably foreseeable harm").

Other jurisdictions, conversely, have concluded that claims premised on theories of negligent supervision or retention are barred by the First Amendment because such claims "necessarily involve interpretation of religious doctrine, policy, and administration" and could result in an impermissible endorsement of religion by approving one

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particular model of supervision. *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997) (concluding that negligent supervision claim cannot be resolved through neutral principles of law because “[a]djudicating the reasonableness of a church’s supervision of a cleric — what the church ‘should know’ — requires inquiry into religious doctrine”); *see also Ayon v. Gourley*, 47 F.Supp.2d 1246, 1250-51 (D. Colo. 1998) (holding that negligent supervision claim “must be dismissed as violative of the First Amendment” because “the procedures that the Archdiocese Defendants have in place regarding supervision would have to be examined to determine whether they were reasonable and adequate” and such examination “would clearly be inappropriate governmental involvement and a burden on these Defendants’ exercise of religion”), *aff’d*, 185 F.2d 873 (10th Cir. 1999) (unpublished); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997) (concluding that negligent supervision claim must be dismissed because “[t]he imposition of secular duties and liability on the church . . . will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest”).

This is not the first occasion on which this Court has confronted this issue. In *Smith v. Privette*, 128 N.C. App. 490, 495 S.E.2d 395 (1998), the plaintiffs, who were members of the administrative staff for White Plains United Methodist Church of Cary (“White Plains”), filed a civil action against White Plains, the Raleigh District of the North Carolina Conference of the United Methodist Church, and the North Carolina Conference of the United Methodist Church (collectively “the church defendants”), alleging that the church defendants negligently supervised Privette, the senior pastor at White Plains who had allegedly committed various “inappropriate, unwelcome, offensive and nonconsensual acts of a sexual nature” against the plaintiffs. *Id.* at 492, 495 S.E.2d at 396. The plaintiffs alleged in their complaint that “the [c]hurch [d]efendants knew or should have known of Privette’s propensity for sexual harassment of and assault and battery upon female employees and that they failed to take any action to warn or protect the [p]laintiffs from Privette’s tortious activity.” *Id.*

The church defendants moved to dismiss the plaintiffs’ claims against them for lack of subject matter jurisdiction, and the trial court granted their motion, ruling that a civil court’s “second-guess[ing] the discipline of clergy is an intrusion into matters of church governance . . . and would constitute an excessive entanglement between church and state thereby violating . . . the First Amendment.” *Id.* at 493, 495 S.E.2d at 396-97 (brackets omitted). On appeal, this Court reversed the trial

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court's dismissal of the plaintiffs' negligent supervision claim, rejecting the notion that a negligent supervision claim against a religious organization necessarily requires inquiry into religious doctrine, thereby entangling civil courts in ecclesiastical matters in violation of the First Amendment. *Id.* at 493, 495 S.E.2d at 397. Instead, we recognized the distinction between (1) a claim seeking to impose liability for a church's decisions to hire or discharge a cleric, which we recognized as "inextricable from religious doctrine and protected by the First Amendment"; and (2) an assertion that the church was civilly liable for a minister's wrongful conduct because it knew or had reason to know of his proclivity for sexual misconduct. *Id.* at 495, 495 S.E.2d at 398. We expressly noted that adjudication of the latter claim would not

require[] the trial court to inquire into the [c]hurch [d]efendants' reasons for choosing Privette to serve as a minister. The [p]laintiffs' claim, construed in the light most favorable to them, instead presents the issue of whether the [c]hurch [d]efendants knew or had reason to know of Privette's propensity to engage in sexual misconduct . . .

Id.

We therefore concluded that such a claim is not barred by the First Amendment because determining whether the church defendants knew or had reason to know of its employee's proclivities for sexual wrongdoing required only the application of neutral principles of tort law, observing that "the application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution." *Id.* at 494, 495 S.E.2d at 397 (citation, quotation marks, and brackets omitted).

We believe that the result we reached in *Privette* is equally applicable to Plaintiff's negligent supervision claim here. In the present case, Plaintiff has alleged that Sepulveda — an employee of the Diocese — sexually assaulted Plaintiff and that the Diocese Defendants knew or had reason to know of Sepulveda's sexual attraction to, and propensity to engage in sexual misconduct with, minors. There is no meaningful distinction between these allegations and the allegations asserted by the plaintiffs in *Privette*.

Notably, the Diocese Defendants have made clear in this litigation that they are not contending that the First Amendment serves as an absolute shield barring all claims seeking to hold churches civilly liable based on the sexual assaults of their clerics. Nor do they contend that *Privette* conflicts with our Supreme Court's decision in *Harris* or that *Privette* was wrongly decided.

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Instead, the Diocese Defendants attempt to distinguish *Privette* from the present case on two grounds. First, they contend that in *Privette* “the church defendants *conceded* that their conduct was not informed by ‘the tenets or practices of the Methodist Church,’ and therefore, ‘there [was] no necessity for the court to interpret or weigh church doctrine in its adjudication of the plaintiffs’ claim for negligent retention and supervision.’ ” This argument is based on a misreading of *Privette*. Contrary to the Diocese Defendants’ assertion, the church defendants in *Privette* specifically argued that the determination of whether they negligently supervised Privette “necessarily requires inquiry into their religious doctrine and that such an inquiry is not permitted under the First Amendment.” *Id.* at 493, 495 S.E.2d at 397. Rather than conceding that their supervisory role was not informed by religious doctrine, the church defendants in *Privette* merely acknowledged the commonsense understanding that *sexual misconduct* is not “part of the tenets or practices of the Methodist Church” — a proposition that is obviously equally true of the Catholic faith. *Id.* at 495, 495 S.E.2d at 398.

Second, the Diocese Defendants seek to distinguish *Privette* on the ground that the church defendants there had actual knowledge of the danger Privette posed based on prior complaints of sexual misconduct that had been made against him whereas here the complaint does not specifically allege that Sepulveda had committed sexual assaults on other victims prior to those inflicted upon Plaintiff. However, this distinction was not the basis for our holding in *Privette* that the plaintiffs’ negligent supervision claim could be adjudicated without entangling the court in religious doctrine. In our decision, we explained that in order to establish supervisory negligence “against an employer, the plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to that act, the employer *knew or had reason to know of* the employee’s incompetency.” *Id.* at 494-95, 495 S.E.2d at 398 (citation and quotation marks omitted and emphasis added). We did *not* hold that a plaintiff’s complaint must contain allegations of actual knowledge by the church of other sexual wrongdoing by the cleric in order for a religious entity to be held liable under a negligent supervision theory consistent with First Amendment limitations. Were we to adopt the Diocese Defendants’ argument on this issue, then the First Amendment would, as a practical matter, serve as a complete shield to tort liability for religious organizations in the sexual abuse context except in those cases in which the plaintiff specifically alleged prior sexual assaults by the cleric at issue. We do not believe the First Amendment requires such a result.

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While evidence of actual knowledge on the part of the Diocese Defendants of prior assaults by Sepulveda against other victims might strengthen Plaintiff's case against them in the eyes of a jury, the distinction between allegations of actual notice and allegations of constructive notice does not control the subject matter jurisdiction issue currently before us. Neutral principles of law allow a civil court to adjudicate Plaintiff's claim that the Diocese Defendants knew or should have known of the danger posed by Sepulveda to Plaintiff because of his sexual attraction to minors. Furthermore, a ruling that Plaintiff "was required to specifically allege precisely *how* the Diocese Defendants "knew or should have known" that Sepulveda posed such a danger would constitute a heightened pleading requirement that finds no recognition in the caselaw of our appellate courts.

Adjudication of Plaintiff's negligent supervision claim does not require a civil court to determine issues such as (1) whether Sepulveda should have ever been incardinated; (2) whether he should have been allowed to remain a priest; or (3) whether his relationship with the Diocese should have been severed. All of these questions are inextricably bound up with church doctrine and cannot be decided by a civil court consistent with First Amendment principles. Instead, the issue to be determined in connection with Plaintiff's negligent supervision claim is a purely secular one. Neutral principles of law govern this inquiry and, for this reason, subject matter jurisdiction exists in the trial court over this claim.⁷

7. Plaintiff's complaint also includes an allegation that "[w]hen he was incardinated, Sepulveda was inadequately screened for the positions he would later be given by the Bishop." The Diocese Defendants contend that this allegation is indicative of a claim for negligent hiring — a cause of action this Court has previously rejected as constitutionally prohibited. *See Privette*, 128 N.C. App. at 495, 495 S.E.2d at 398 ("[T]he decision to hire . . . a minister is inextricable from religious doctrine and protected by the First Amendment from judicial inquiry."). At oral argument, Plaintiff acknowledged that this allegation was not intended as a negligent hiring claim against the Diocese Defendants. For the sake of clarity, we hold that Plaintiff is not permitted to proceed on any claim that the Diocese Defendants were negligent in hiring Sepulveda as such a claim would clearly be forbidden by the First Amendment. The Diocese Defendants also raise entanglement concerns as to the allegation in the complaint that Bishop Burbidge "was grossly negligent in having insufficient guidelines in effect within the Diocese to define the proper boundaries between priests of the Diocese and its parishioners." We agree that the First Amendment would not permit a civil court to dictate the content of guidelines issued by the Diocese that relate to ecclesiastical matters. But such an intrusion on First Amendment principles does not exist where, as here, a court is simply asked to adjudicate a claim that a church knew or should have been aware that one particular cleric posed a danger to a plaintiff based on his sexual interest in children.

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2. Negligent Failure to Require Sepulveda to Undergo STD Testing

Plaintiff also asserts a negligence claim against the Diocese Defendants based on their failure to compel Sepulveda to undergo STD testing. In support of this claim, Plaintiff alleged that when he requested that the Diocese Defendants “require Sepulveda to submit to a test for sexually transmitted diseases and inform the Plaintiff of the results so he could be assured of his health, the Bishop and the Diocese refused to require that Sepulveda do so, even though each has the authority to do so.” Plaintiff further asserted in his complaint that the Diocese Defendants had sufficient authority over Sepulveda to compel such testing because Bishop Burbidge “holds all executive, judicial, and legislative authority within the Diocese, and holds specifically from Sepulveda a duty of obedience to the Bishop.”

In contrast to Plaintiff’s claim for negligent supervision, adjudication of this claim would, by definition, require the examination of church doctrine and thus constitute “precisely the type of ecclesiastical inquiry courts are forbidden to make.” *Harris*, 361 N.C. at 273, 643 S.E.2d at 571. As our Supreme Court explained in *Harris*, a civil court is constitutionally prohibited from “interpos[ing] its judgment” on the proper role of church leaders and the scope of their authority “[b]ecause a church’s religious doctrine and practice affect its understanding of each of these concepts.” *Id.*

Rather than existing as a claim that can be decided based on neutral principles unrelated to religious doctrine, this theory of liability *is premised on* the tenets of the Catholic church — namely, the degree of control existing in the relationship between a bishop and a priest. This claim seeks to impose liability based on the Diocese Defendants’ alleged failure to exercise their authority over a priest stemming from an oath of obedience taken by him pursuant to the church’s canon law. As such, this claim directly “challenges church actions involving religious doctrine and practice” and cannot be adjudicated without entangling a secular court in ecclesiastical matters. *Id.* at 275, 643 S.E.2d at 572. The trial court therefore erred in denying the Diocese Defendants’ motion to dismiss as to this claim. *See id.* (“[W]hen a party challenges church actions involving religious doctrine and practice, court intervention is constitutionally forbidden.”).

C. NIED Claims

Plaintiff’s complaint also contains claims alleging that the Diocese Defendants negligently inflicted emotional distress on Plaintiff by

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(1) failing to protect him from Sepulveda; and (2) failing to require Sepulveda to undergo STD testing.

To properly set out a claim for NIED, “a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as ‘mental anguish’), and (3) the conduct did in fact cause the plaintiff severe emotional distress.” *Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Because NIED claims are premised upon negligent conduct by the defendants, a determination that the underlying negligence claim is subject to dismissal will result in the dismissal of the corresponding NIED claim as well. *See Thomas v. Weddle*, 167 N.C. App. 283, 290, 605 S.E.2d 244, 249 (2004) (“A claim for negligent infliction of emotional distress . . . depends upon evidence that the defendants acted negligently. Thus, this claim fails for the same reasons as plaintiffs’ other negligence claims.” (internal citation omitted)).

1. NIED Based on Negligent Supervision

As explained above, the issue of whether the Diocese Defendants knew or should have known that Sepulveda posed a danger to minors such as Plaintiff because of his sexual attraction to them — the determination central to the adjudication of Plaintiff’s negligent supervision claim — can be resolved through the application of neutral principles of law and therefore does not require dismissal under Rule 12(b)(1). Consequently, Plaintiff’s NIED claim premised on the assertion that such negligent conduct resulted in him suffering severe emotional distress and that it was reasonably foreseeable that the Diocese Defendants’ conduct would result in such distress is likewise permissible under the First Amendment. Because a determination of whether Plaintiff has successfully established the elements of NIED based on the Diocese Defendants’ negligent supervision of Sepulveda will not entangle the court in ecclesiastical inquires, subject matter jurisdiction exists in the trial court as to this claim.

2. NIED Based on Failure to Require Sepulveda to Undergo STD Testing

As with Plaintiff’s underlying negligence claim based on the Diocese Defendants’ failure to require Sepulveda to undergo STD testing, Plaintiff’s NIED claim based on those same allegations would necessarily require the court to examine and interpret church doctrine governing the relationship between a priest and a bishop in order to adjudicate the claim. Such an inquiry is, once again, constitutionally prohibited, and

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Plaintiff's NIED claim arising out of the Diocese Defendants' failure to compel Sepulveda to undergo STD testing must therefore be dismissed pursuant to Rule 12(b)(1). *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571 (explaining that dismissal is required when "no neutral principles of law exist to resolve . . . claims" so that court can "avoid[] becoming impermissibly entangled in the dispute").

Conclusion

For the reasons stated above, we affirm in part and reverse in part the trial court's 2 June 2014 order. Plaintiff's claims for negligent supervision and NIED based upon the Diocese Defendants' allegedly negligent supervision of Sepulveda may be resolved through the application of neutral principles of law and, therefore, are not barred by the First Amendment. Plaintiff's claims for negligence and NIED based on the Diocese Defendants' failure to compel Sepulveda to undergo STD testing, conversely, would entangle the court in ecclesiastical matters and are dismissed under Rule 12(b)(1).

AFFIRMED IN PART; REVERSED IN PART.

Judges STEELMAN and HUNTER, JR. concur.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

YEUN-HEE JUHN, PLAINTIFF
v.
DO-BUM JUHN, DEFENDANT

No. COA14-1271

Filed 7 July 2015

1. Appeal and Error—notice of appeal—timeliness—service requirements

Plaintiff wife's motion to dismiss defendant husband's appeal in an alimony and child support case as untimely was denied. Defendant's failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure required application of Rule 3(c)(2) and not Rule 3(c)(1). Thus, defendant's notice of appeal was timely filed within thirty days of defendant receiving the trial court's order.

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2. Divorce—alimony—child support—bad faith reporting of income

The trial court did not abuse its discretion by its award of child support and alimony. Its findings of fact were based upon competent evidence and supported its conclusions of law that defendant husband had acted in bad faith regarding the reporting of his income.

3. Divorce—alimony—duration—sufficiency of findings

The trial court did not err by awarding plaintiff wife eighteen years of alimony. The trial court made sufficient findings as to the reasons for the amount, duration, and manner of payment.

4. Divorce—alimony—twenty months' delay entering order—no prejudice

Where defendant husband was not prejudiced by the trial court's delay in entering an order for alimony twenty months after the last hearing, defendant could not show that his constitutional rights were violated.

Appeal by defendant from order entered 10 February 2014 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 19 May 2015.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell and Tobias S. Hampson, for plaintiff-appellee.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of fact are based upon competent evidence and support the trial court's conclusions of law that defendant has acted in bad faith regarding the reporting of his income, we do not find an abuse of discretion by the trial court in its award of child support and alimony. An award of alimony will be upheld where the trial court makes sufficient findings as to the reasons for the amount, duration, and manner of payment of alimony. Where defendant was not prejudiced by the trial court's delay in entering an order for alimony, defendant cannot show that his constitutional rights were violated.

Plaintiff Yeun-Hee Juhn and defendant Do-Bum Juhn married on 29 June 1991. Three minor children were born of the marriage.

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Plaintiff and defendant separated on 27 August 2007 after sixteen years of marriage.

On 4 September 2007, plaintiff filed a complaint for child custody, child support, post-separation support, alimony, equitable distribution, and attorneys' fees. Defendant filed an answer and counterclaims for child custody and equitable distribution on 26 September. A consent order for temporary child support and interim post-separation support was agreed to by the parties on 17 October. Plaintiff then filed an amended complaint for child custody, child support, post-separation support, alimony, equitable distribution, and attorneys' fees on 17 December.

On 24 March 2008, defendant agreed to pay \$750.00 a month in temporary child support, and to pay for plaintiff's mortgage and car payment. Defendant filed an amended answer and counterclaims for child custody and equitable distribution on 2 September. On 18 December, both parties agreed to dismiss their respective claims for equitable distribution. The parties also agreed to a memorandum of judgment under which defendant would pay plaintiff \$1,485.00 a month in post-separation support and \$750.00 in temporary child support.

On 1 December 2009, a permanent child custody, child support, and modification of post-separation support order was entered by the trial court. Plaintiff filed a new motion for child support and attorneys' fees on 8 February 2011. After hearings on 9 May 2010, 13 July 2011, 5 February 2012, 21 March 2012, and 1 June 2012, an order for permanent alimony, child support, and attorneys' fees was entered by the trial court on 10 February 2014. Defendant appeals.

[1] At the outset, we note that plaintiff filed a motion to dismiss defendant's appeal pursuant to N.C. R. App. P. 3(c)(3). Plaintiff argues that under Rule 3, defendant had thirty days to file a notice of appeal from the date the trial court served its order upon both parties.

Pursuant to N.C. R. App. P. 3, a notice of appeal must be filed within thirty days if the party is served within three days of entry of judgment, or within thirty days after a party is served and service occurs outside a three-day period after entry of judgment. N.C. R. App. P. 3(c)(1), (2) (2014).

Here, the evidence provided by plaintiff shows that a Family Court Administrator sent an email to both parties notifying each that the trial court's order, entered 10 February 2014, had been placed in the mail on 17 February 2014. However, plaintiff has not provided a certificate of

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service nor any other evidence, such as a copy of the envelope showing the postmark date/stamp, to show that defendant was served within three days of entry of judgment; as such, Rule 3(c)(2) is applicable.¹ This Court has addressed a similar matter concerning the timely filing of a notice of appeal in *Frank v. Savage*, 205 N.C. App. 183, 695 S.E.2d 509 (2010). In *Frank*, the defendant filed a motion to dismiss the plaintiff's appeal as being untimely filed. This Court denied the defendant's motion, finding that the defendant failed to provide a certificate of service as required by Rule 58: "We believe that Defendant's failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure in the present case requires us to apply Rule 3(c)(2) and not Rule 3(c)(1). We therefore hold Plaintiff's appeal is timely." *Id.* at 187, 695 S.E.2d at 512.

In the instant case, defendant has provided evidence that he received a copy of the trial court's order on 28 February 2014, and that he filed his notice of appeal on 24 March 2014. Moreover, the email from the Family Court Administrator does not qualify as a certificate of service under *Frank* and, thus, defendant was not "served" on 17 February 2014 under Rule 3(c)(2). Accordingly, based on this Court's reasoning in *Frank*, and on the evidence presented here, defendant's notice of appeal in the instant case was timely filed within thirty days of defendant receiving the trial court's order. Plaintiff's motion to dismiss defendant's appeal as untimely is, therefore, denied.

On appeal, defendant raises three issues as to whether the trial court erred: (I) by finding defendant acted in bad faith regarding his income; (II) in awarding plaintiff eighteen years of alimony; and (III) in not issuing its order until twenty months after the last hearing.

I.

[2] Defendant argues that the trial court erred by finding defendant acted in bad faith regarding his income. We disagree.

Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was

1. "In civil actions and special proceedings, a party must file and serve a notice of appeal: . . . within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]" N.C. R. App. P. 3(c)(2) (2014).

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competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citations and quotation omitted). An abuse of discretion occurs when the trial court's decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted).

Defendant contends the trial court erred in finding that defendant acted in bad faith and then imputing income to him based on his bad faith.

The trial court may . . . modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) wilfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business. When the evidence shows that a party has acted in "bad faith," the trial court may refuse to modify the support awards. If a husband has acted in "good faith" that resulted in the reduction of his income, application of the earnings capacity rule is improper.

The dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent.

Wolf v. Wolf, 151 N.C. App. 523, 526–27, 566 S.E.2d 516, 518–19 (2002) (citations omitted).

In his brief, defendant lists the trial court's findings of fact 40, 42–43, 63, 66–69 as being erroneous. However, defendant fails to set forth any specific challenges to the findings of fact and instead presents a broad

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argument which merely contends that “the evidence at trial [did] not support a finding that [defendant] acted in bad faith, warranting the imputation of income to [defendant.]” It is well established by this Court that where a trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010). As defendant has failed to articulate challenges to these specific findings of fact, we find these findings to be not only binding on appeal, but also supported by competent evidence demonstrating that defendant did indeed act in bad faith regarding his income.

Moreover, even assuming *arguendo* that defendant’s broad argument is sufficient enough to challenge these specific findings of fact on appeal, defendant’s argument still must fail. Defendant challenges the trial court’s findings of fact that defendant: had “the capacity and ability to earn [\$134,500.00] in 2008”; “engaged in a pattern of concealing income and under reporting his income which was fraudulent, deceitful, and demonstrative of bad faith”; filed falsified and inaccurate tax returns in 2007 and 2008; “has engaged in a course of conduct subsequent to the date of separation designed to deliberately depress his income because of his blatant disregard of his marital obligation to provide support for his dependent spouse and his children”; has “the capacity to earn at least \$120,000.00 per year or \$10,000.00 per month”; and that defendant “is a supporting spouse and is financially able to pay alimony and child support.” Defendant has not, however, challenged the trial court’s remaining findings of fact, which include findings that: defendant committed marital misconduct by abandoning plaintiff and their three children; plaintiff was a homemaker during the entire course of her marriage to defendant; “[d]efendant has an earning capacity far greater than that of [plaintiff] and has demonstrated that capacity”; defendant “intentionally shut down his brokerage business” and “intentionally understated [his brokerage business’s] corporate income by at least \$44,684.00”; defendant’s tax returns for 2007 and 2008 were “spurious” and contained falsified and inaccurate information, including defendant forging his wife’s signature on the tax returns; defendant has provided for his paramour and her children while refusing to provide support to plaintiff and his children; and that since plaintiff filed her claim for divorce, defendant has “engaged in voluntary unemployment or underemployment,” or “is simply hiding income.” These unchallenged findings are more than sufficient to support the trial court’s conclusion that defendant acted in bad faith, and that the imputation of income to defendant would be appropriate. Moreover, we note that these unchallenged findings of fact clearly support the trial court’s conclusion of law that:

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Defendant (1) failed to exercise his reasonable capacity to earn; (2) deliberately avoided family financial responsibilities; (3) acted in deliberate disregard of his support obligations; (4) refused to seek or keep gainful employment; (5) willfully refused to secure or take a job; (6) deliberately did not apply himself to his business; (7) intentionally depressed income; and (8) intentionally left employment to go into another business and that based on this conduct, he intended to avoid his duty of support to Plaintiff and their children and acted in bad faith such that income may be imputed to him.

Defendant's argument is, accordingly, overruled.

II.

[3] Defendant contends the trial court erred in awarding plaintiff eighteen years of alimony. We disagree.

The standard of review is the same as that stated in *Issue I*.

Pursuant to North Carolina General Statutes, section 50-16.3A, “[t]he court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term.” N.C. Gen. Stat. § 50-16.3A(b) (2013). “In determining the amount, duration, and manner of payment of alimony,” the trial court must consider sixteen relevant factors, including marital misconduct, duration of marriage, and earning capabilities of the parties. *Id.* “[A] trial court’s failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c).” *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522–23 (2003) (citation omitted); *see also* N.C. Gen. Stat. § 50-16.3(A)(c) (2013) (holding that where a trial court decides, in its discretion, to award alimony, the trial court must give its reasons for the award’s amount, duration, and manner of payment).

In its order awarding plaintiff eighteen years of alimony, the trial court made seventy-six findings of fact, including findings that defendant: engaged in marital misconduct; was “always the sole means of support of the family”; has a greater earning capacity than that of plaintiff; has deliberately underreported his income to the trial court and on his tax returns; has filed falsified and inaccurate tax returns; has provided for his paramour and her children while refusing to support plaintiff and his children; and has either engaged in voluntary unemployment or has been hiding income in an attempt to avoid supporting plaintiff. The trial

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court also made findings that plaintiff: “was absent from the market-place for over 16 years while she raised the children, and lacks English language skills which make her functionally unemployable”; has “neither the education nor training to permit her to find employment to meet her reasonable economic needs in the United States”; “has significantly less earning potential or earning capacity than Defendant”; had to quit a cosmetology program because she could not afford the training; has had to borrow money from her sisters to pay the expenses of herself and the minor children; has been reliant on her sisters for housing, food, and other assistance; “is in debt with no prospect of working her way out of it due to her having no assets and the extent of her personal liabilities”; and that “[at] age 47, [she] is a dependent spouse and is in need of alimony based upon a consideration of the factors enumerated above, as contained in G.S. 50-16.3A(b), for a duration of eighteen years, which the Court finds to be reasonable under the circumstances[.]” The trial court then concluded as a matter of law that:

8. Pursuant to N.C.G.S. § 50-16.3A(a) the Court further concludes that an award of alimony to Plaintiff would be equitable considering all of the relevant factors, including those set forth in N.C.G.S. 50-16.3A(b), as outlined above.

9. Specifically, the Court concludes as a matter of law that Plaintiff is entitled to an award of alimony in the amount, duration and manner specified herein based on the Court’s favorable consideration to Plaintiff of the factors contained in N.C.G.S. 50-16.3A(b)(2), (3), (5), (6), (7), (9), (10), (12) and (13), as applied to the facts of this case.

10. The Court concludes that eighteen years from January 27, 2010 is a reasonable length of time for the Plaintiff to receive[] alimony from the Defendant and concludes the Plaintiff is entitled to retroactive alimony to January 27, 2010.

We find that such numerous and thorough findings of fact and conclusions of law are more than sufficient to support the trial court’s decision to award plaintiff alimony for a term of eighteen years.²

2. We further note that the trial court made several findings of fact which stated that plaintiff (at the time of the trial court’s order) was forty-seven years old. Given that the trial court made numerous findings of fact that plaintiff is “in debt with no prospect of working her way out of it” and is “functionally unemployable,” it is certainly conceivable that by awarding eighteen years of alimony, the trial court intended for plaintiff to receive alimony until she reaches the age of sixty-five and becomes eligible for social security and other governmental assistance.

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See Ellis v. Ellis, __ N.C. App. __, 767 S.E.2d 413 (2014) (upholding the trial court's order awarding alimony for a term of two years to the plaintiff where the trial court properly considered the statutory factors under N.C.G.S. § 50-16.3A(b) and made findings of fact that an alimony award of two years was appropriate given the plaintiff's acts of marital misconduct, bad faith during the divorce process, depletion of the marital estate, and refusal to secure employment). Defendant's argument is, therefore, overruled.

III.

[4] Finally, defendant argues that the trial court erred in not issuing its order until twenty months after the last hearing. Specifically, defendant contends the trial court's delay in entering its order for alimony has violated defendant's constitutional rights. Defendant does not cite any substantive case law in support of his argument, however, in violation of Rule 28 of our Rules of Appellate Procedure. N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Further, this Court has previously addressed and denied defendant's argument in *Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (2006).

In *Rhew*, the plaintiff contended the trial court, by delaying entry of an alimony order, had violated his constitutional rights. The plaintiff based his argument upon *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000), in which this Court held that a nineteen-month delay by the trial court between an equitable distribution hearing and entry of an equitable distribution order had violated the defendant's rights. *Rhew* distinguished itself from *Wall*, however, by noting that "*Wall* dealt with an equitable distribution award, while the present case involves alimony." *Rhew*, 178 N.C. App. at 482, 631 S.E.2d at 865. "Indeed, since *Wall*, this Court has declined to reverse late-entered . . . orders where the facts have revealed that the complaining party was not prejudiced by the delay." *Britt v. Britt*, 168 N.C. App. 198, 202, 606 S.E.2d 910, 912 (2005) (holding that a delay of sixteen months between hearing and entry of equitable distribution order was not prejudicial) (citing *White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, 269 (holding that delay of seven months between hearing and entry of equitable distribution order was not prejudicial)).

In the instant matter, defendant argues that the "extreme delay was prejudicial" because, "[s]ince [defendant] had made no payments in twenty months, he is [now] lumped with an extreme arrears amount." However, we note defendant was under an order to pay post-separation

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support and child support prior to the trial court's entry of an order for permanent alimony, and defendant has presented no evidence as to why he did not make the required post-separation support and child support payments during this time period (almost four years), nor has defendant shown how the trial court's delayed entry of the alimony and child support order has prejudiced him. In fact, on this record, it appears only plaintiff has suffered substantial prejudice, not defendant.

Defendant further contends he has been delayed by the late entry of the order because hearing transcripts and exhibits have been lost during this twenty-month period. Defendant presents no specific arguments or examples as to exactly how he has been prejudiced by this loss of trial court materials, nor does he cite any case law in support of his argument. Moreover, the record, as presented on appeal, is sufficiently complete to permit a satisfactory review of defendant's arguments. Defendant's contention is, therefore, overruled.

The order of the trial court is affirmed.

AFFIRMED.

Judges STEPHENS and DIETZ concur.

HANNAH MARIE JOHNSON KEARNEY, PLAINTIFF
v.
BRUCE R. BOLLING, M.D., DEFENDANT

No. COA14-671

Filed 7 July 2015

1. Medical Malpractice—expert witness—American College of Surgeons guidelines

The trial court did not err in a medical malpractice action by allowing defense counsel to cross-examine plaintiff's expert witness on the American College of Surgeons' policy statement on physicians acting as expert witnesses. Permitting such testimony was not an abuse of discretion, and it did not undermine the trial court's ruling that, as a matter of evidentiary law, the witness was qualified to render expert testimony.

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2. Appeals and Error—failure to object—issue not preserved

In a medical malpractice action, plaintiff failed to object to a line of cross-examination concerning her expert witness's rejection from medical schools in the United States, thereby failing to preserve the issue for appellate review.

3. Medical Malpractice—American College of Surgeons guidelines—motion to strike

The trial court did not err in a medical malpractice action by allowing one of defendant's expert witnesses to testify regarding the American College of Surgeons' policy statement on physicians acting as expert witnesses. Even though the witness testified as to what the organization "would say" and the trial court could have granted plaintiff's motion to strike, the Court of Appeals held that the trial court did not abuse its discretion.

4. Medical Malpractice—qualification of medical expert witness

The trial court did not err in a medical malpractice action by qualifying one of defendant's witnesses as a medical expert. Because the expert testified that he was familiar with a town similar to Winston-Salem, that current demographic differences were the result of a later recent hurricane, that he associated with doctors in Winston-Salem, and that he felt very comfortable with his familiarity with the standard of care in Winston-Salem at the relevant time, the Court of Appeals could not conclude that the trial court had abused its discretion.

5. Medical Malpractice—motion to amend complaint during trial—lack of informed consent claim

The trial court did not err in a medical malpractice action by granting defendant's motion in limine and denying plaintiff's motion to amend her complaint during trial, effectively prohibiting plaintiff for pursuing a claim based on lack of informed consent. Plaintiff did not comply with Rule 9(j) on the consent issue, and defense counsel's questions at trial did not amount to litigation of a lack of informed consent claim.

Appeal by plaintiff from judgment entered 22 August 2013 by Judge Hugh B. Lewis in Forsyth County Superior Court. Heard in the Court of Appeals 19 March 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellant.

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Shumaker, Loop & Kendrick, LLP, by Lisa M. Hoffman and Scott M. Stevenson, for defendant-appellee.

DIETZ, Judge.

Plaintiff Hannah Marie Johnson Kearney appeals from a defense verdict in her medical malpractice action against Dr. Bruce R. Bolling. Kearney's lawsuit stems from serious complications she suffered following gallbladder surgery. She challenges a number of evidentiary rulings by the trial court, including the court's decision to permit testimony that Kearney's expert witness did not satisfy the criteria for expert testimony established by the American College of Surgeons, a voluntary organization to which the expert belonged. Kearney also challenges the trial court's determination that one of Dr. Bolling's expert witnesses was familiar with the standard of care in a community of similar size to Winston-Salem. Finally, Kearney challenges the trial court's grant of a motion *in limine* and denial of a mid-trial motion to amend her complaint to add a new legal theory based on lack of informed consent.

Kearney's arguments present close questions. But this Court's review of evidentiary rulings and other mid-trial discretionary decisions by a trial court is severely limited. These rulings are reviewed for abuse of discretion and this Court can reverse only if the trial court's rulings appear so arbitrary that they could not be the result of a reasoned decision. Although we may not agree with all of the trial court's rulings below, we cannot say that those rulings were so manifestly arbitrary that they constituted an abuse of discretion. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

On 17 March 2009, Plaintiff Hannah Marie Johnson Kearney went to the emergency department of Forsyth Medical Center in Winston-Salem, complaining of severe chest and abdominal pain. The emergency department consulted Defendant Dr. Bruce Bolling, who determined that Kearney had acute cholecystitis and needed to have her gallbladder removed. Dr. Bolling performed a laparoscopic cholecystectomy on Kearney on 17 March 2009. Kearney was discharged from Forsyth Medical Center on 18 March 2009.

Kearney returned to Forsyth Medical Center on 19 March 2009, complaining of severe pain. Dr. Bolling ordered several diagnostic tests, but the results of the tests were normal. Kearney again was discharged on 22 March 2009. On 23 March 2009, Kearney was readmitted to Forsyth

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Medical Center. Dr. Bolling ordered a HIDA scan, which showed a bile leak caused by a hole in Kearney's right hepatic duct. As a result of the bile leak, Kearney required additional hospitalization and surgical procedures, including a roux-en-y surgery, to repair the leak. Kearney fired Dr. Bolling on 27 March 2009 and retained new doctors for these additional procedures.

On 30 September 2011, Kearney filed a medical malpractice complaint against Dr. Bolling alleging that Dr. Bolling was "negligent in his care and treatment" of her. On 18 January 2012, Dr. Bolling filed a motion to dismiss, arguing that Kearney failed to effect proper service of the complaint and summons. The trial court denied the motion.

The case went to trial on 15 July 2013. On the first day of trial, Dr. Bolling filed a motion *in limine*, asking the trial court to exclude any evidence "regarding or relating to Defendant's alleged failure to obtain informed consent" on the ground that "such allegations were not contained in the Plaintiff's Complaint and therefore the Defendant did not have proper notice of such allegation." The trial court granted this motion.

Later in the trial, Kearney moved to amend her complaint to add the theory of lack of informed consent after Dr. Bolling's counsel questioned Kearney on cross-examination about whether she had signed a consent form prior to her initial surgery. After hearing arguments from both parties, the trial court denied Kearney's motion, finding that the doctrine of amendment by implication was inapplicable and that the amendment would cause undue prejudice and surprise to Dr. Bolling.

Also during trial, Kearney tendered Dr. Brickman, a medical school professor of surgery, as an expert witness. The court accepted Dr. Brickman as an expert witness in the field of general surgery. Dr. Brickman testified that he was a fellow in the American College of Surgeons, "an honorary society to which you apply for admission after you become board-certified," and that "[i]t's a great honor to be a fellow." On cross-examination, defense counsel questioned Dr. Brickman regarding a document issued by the American College of Surgeons entitled "Statement on the physician acting as an expert witness" which sets forth "[r]ecommended qualifications for the physician who acts as an expert witness."

Over Kearney's objections, defense counsel questioned Dr. Brickman and established that he did not meet the American College of Surgeons' guidelines for providing expert testimony. Defense counsel also asked Dr. Brickman, "did you apply to medical school in the United States?"

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Dr. Brickman responded, “I did.” Defense counsel then asked him, “Did you get in?” and Dr. Brickman responded, “I did not.” Kearney did not object to the admissibility of these two questions.

Dr. Bolling called his own expert witnesses during his case in chief. One of those experts, Dr. Todd Heniford, identified the American College of Surgeons’ statement described above and the document was later accepted into evidence—over Kearney’s objection—as Defendant’s Exhibit No. 4. Dr. Heniford also testified—again over Kearney’s objection—that Dr. Brickman was not in compliance with the American College of Surgeons’ guidelines for expert testimony and that “[t]he American College of Surgeons would say that he absolutely should not be an expert witness . . . honestly, he should rule himself out.”

Dr. Bolling also proffered another expert witness, Dr. William Nealon, a specialist in pancreaticobiliary and hepatic surgery at Vanderbilt University in Nashville, Tennessee. Dr. Nealon testified that he was familiar with the standard of care in communities similar to Winston-Salem, North Carolina—specifically “Beaumont, Texas, where they have a hospital that is almost identical in size to Forsyth Hospital, and the community itself is almost identical in size. . . . And just judging by the demographics for Winston-Salem and Forsyth Hospital, it seems almost identical.” Dr. Nealon also testified that he was familiar with Wake Forest University and that he “associate[s] and speak[s] with general surgeons at Wake Forest University.”

Plaintiff’s counsel then questioned Dr. Nealon, through *voir dire*, about his familiarity with Winston-Salem or similar communities. When asked how he knew the size of Beaumont, Texas, Dr. Nealon responded that he “read it in the newspaper.” Plaintiff’s counsel then presented demographic information to Dr. Nealon indicating that Beaumont, Texas was significantly smaller than Winston-Salem. The demographic information showed that in 2013 Beaumont had a population of approximately 118,000 compared to Winston-Salem’s 234,000; Beaumont’s hospital had 456 beds to Forsyth Medical Center’s 681; and Beaumont’s hospital had 20,658 admissions where Forsyth Medical Center had 40,938. Dr. Nealon testified that he believed the discrepancy was the result of a population decrease caused by a severe hurricane that hit the Beaumont area sometime after 2009.

After plaintiff’s counsel completed the *voir dire* of Dr. Nealon, defense counsel asked Dr. Nealon, “do you believe that regardless of what the population is today in those cities, that you are familiar with the

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standard of care for Winston-Salem or similar communities as it existed in 2009?” Dr. Nealon replied, “Yes, I feel very comfortable about that.”

Defense counsel then tendered Dr. Nealon for acceptance as an expert witness, arguing that Dr. Nealon “has certainly demonstrated for this court that he is familiar with the standard of care in 2009 for the same or similar communities.” Plaintiff’s counsel objected, arguing that Dr. Nealon was not qualified to testify as an expert because he failed to establish his familiarity with the standard of care in Winston-Salem or a similar community because Beaumont, Texas was not sufficiently similar to Winston-Salem. The trial court found that Dr. Nealon met the statutory requirements for expert testimony. Dr. Nealon then testified that, in his opinion, Dr. Bolling “[met] the standard of care,” “used his best judgment,” and “used reasonable care” “in all respects, in the care and treatment of [Kearney] from March 17, 2009, through March 27, 2009.”

On 2 August 2013, the jury returned a verdict in favor of Dr. Bolling. The trial court entered a corresponding judgment on 22 August 2013. Kearney timely appealed.

Analysis**I. Cross-Examination of Dr. Brickman**

[1] Kearney first argues that the trial court erred in allowing defense counsel to cross-examine Kearney’s expert witness, Dr. Brickman, about the American College of Surgeons’ policy statement on physicians acting as expert witnesses. Kearney contends that questions about the association’s guidelines—which recommended that physicians in Dr. Brickman’s position not testify as experts—undermined the trial court’s ruling that Dr. Brickman was qualified to testify as an expert. We disagree.

The trial court has “broad discretion in controlling the scope of cross-examination and a ruling by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006).

A party may question an expert witness to establish inconsistencies and “attack his credibility.” *State v. Gregory*, 340 N.C. 365, 410, 459 S.E.2d 638, 663 (1995). “The largest possible scope should be given, and almost any question may be put to test the value of [an expert’s] testimony.” *Id.* (internal quotation marks omitted). Likewise, “[c]ross examination

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is available to establish bias or interest as grounds of impeachment” because “[e]vidence of a witness’ bias or interest is a circumstance that the jury may properly consider when determining the weight and credibility to give to a witness’ testimony.” *Willoughby v. Kenneth W. Wilkins, M.D., P.A.*, 65 N.C. App. 626, 638, 310 S.E.2d 90, 98 (1983).

Here, Dr. Brickman testified that he belonged to the American College of Surgeons and that he considered it an honor to belong to the organization. The organization’s guidelines state that doctors like Dr. Brickman, who are not actively practicing medicine in a clinical setting, should not testify as expert witnesses. Dr. Brickman chose to ignore those guidelines and testify in this case. The trial court permitted defense counsel to question Dr. Brickman about his violation of the organization’s guidelines in order to challenge his credibility. Under the narrow standard of review applicable to evidentiary issues, we cannot say that the trial court’s decision to permit this line of questioning “was so arbitrary that it could not have been the result of a reasoned decision.” *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723. Accordingly, we must find no abuse of discretion.

Kearney responds by citing *Goudreault v. Kleeman*, 965 A.2d 1040 (N.H. 2009), a New Hampshire Supreme Court opinion affirming the exclusion of similar testimony regarding the American College of Surgeons’ guidelines. But even if *Goudreault* were binding on this Court—and it is not—it does not hold that the American College of Surgeons’ guidelines *never* are admissible for impeachment purposes. The *Goudreault* court held, as we do here, that the trial court’s evidentiary ruling was not an abuse of discretion under the narrow standard of review for evidentiary rulings. *Id.* at 1052. Nothing in *Goudreault* indicates that it would be an abuse of discretion to permit this line of questioning instead of excluding it; indeed, the nature of discretionary rulings means that two trial judges could reach opposite decisions on the same facts and yet neither ruling is reversible error.

Kearney next argues that questioning Dr. Brickman about his compliance with the American College of Surgeons’ guidelines contradicts North Carolina Rule of Evidence 702(b)(2), which expressly permits medical school professors to testify as expert witnesses in medical malpractice actions. Kearney argues that the effect of the trial court’s ruling was to permit a private agreement (the American College of Surgeons’ guidelines) to supersede a state statute (the Rules of Evidence).

But that is not what occurred at trial. Dr. Brickman described his qualifications and expertise at length during direct examination and the

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trial court accepted him as an expert witness in the presence of the jury. Later, during jury instructions, the trial court instructed the jury about what it meant to be an “expert witness” and stated that Dr. Brickman was “a medical expert witness.” Thus, although Dr. Brickman’s cross-examination concerning the American College of Surgeons’ guidelines may have raised questions about credibility and motive to testify, it did not undermine the trial court’s ruling that, as a matter of evidentiary law, Dr. Brickman was qualified to render expert testimony.

Finally, it must be noted that, following cross-examination, the trial court provided Kearney with the opportunity to rehabilitate Dr. Brickman through re-direct examination, and Kearney did just that. In sum, we hold that the trial court’s decision to permit cross-examination concerning the American College of Surgeons’ guidelines was within the trial court’s sound discretion.

[2] Kearney also argues that the trial court erred in permitting a line of cross-examination concerning Dr. Brickman’s application to—and rejection from—medical schools in the United States. Kearney failed to object to these questions, and therefore this issue was not preserved for appellate review.¹ See N.C. R. App. P. 10(a)(1) (2013). In any event, for the same reasons discussed above, these questions could aid the jury in assessing Dr. Brickman’s credibility and thus the trial court did not abuse its broad discretion in permitting this line of questioning.

II. Examination of Dr. Heniford

[3] Kearney next argues that the trial court erred in allowing one of Dr. Bolling’s experts, Dr. Heniford, to testify about the American College of Surgeons’ guidelines. We again hold that the trial court did not abuse its broad discretion in permitting this testimony.

Dr. Heniford testified that he, like Dr. Brickman, was a member of the American College of Surgeons and was familiar with the organization’s guidelines concerning testifying as an expert. The following exchange then took place:

DEFENSE COUNSEL: If the jury should find that Dr. Brickman did not have privileges, did not have an active

1. Defense counsel asked Dr. Brickman questions about his rejection from U.S. medical schools repeatedly during cross-examination. The second time defense counsel asked the question, plaintiff’s counsel objected stating “Objection. We’ve gone over the same thing.” But Kearney did not object on the ground that this line of questioning was improper and the responses inadmissible.

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clinical practice, and was not board certified, is he in compliance with the qualifications as specified by the American College of Surgeons?

DR. HENIFORD: The American College of Surgeons would say that he absolutely should not be an expert witness. And honestly, he should rule himself out.

PLAINTIFF'S COUNSEL: Move to strike, Your Honor, what the American College of Surgeons would say.

THE COURT: The request is denied.

We find Dr. Heniford's answer troubling because he did not merely state his understanding of whether Dr. Bolling could testify consistent with the organization's guidelines, but went further and appeared to speak on behalf of the organization. The trial court certainly *could have* granted the motion to strike that testimony and instructed Dr. Heniford to limit his answer to his understanding of the guidelines.

But again, our review is sharply constrained by the narrow standard of review for evidentiary rulings. Although we may have ruled differently, we cannot say that the trial court's denial of that motion to strike "was so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723. For example, the court may have believed, in light of the tone and demeanor of the witness unavailable to this Court in reviewing the trial transcript, that Dr. Heniford's answer simply conveyed his understanding of the rules of an honorary organization to which both he and Dr. Brickman belong. Thus, we are constrained to hold that the trial court did not abuse its broad discretion in declining to strike Dr. Heniford's testimony.

Kearney also argues that Dr. Bolling's closing argument improperly referenced the various testimony concerning Dr. Brickman's violation of the American College of Surgeons' guidelines. Because we find no error in the admission of this testimony, both during Dr. Brickman's cross-examination and during Dr. Heniford's direct examination, we likewise find no error in the references to that testimony during closing argument. Accordingly, we reject Kearney's argument.

III. Expert Testimony of Dr. Nealon

[4] Kearney next argues that the trial court erred in qualifying one of Dr. Bolling's witnesses, Dr. Nealon, as a medical expert. Kearney contends that Dr. Nealon was not qualified to testify as a medical expert because he did not show that he is familiar with the standard of care in

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Winston-Salem or a similar community, a mandatory criteria for expert witnesses under N.C. R. Evid. 702(b) and N.C. Gen. Stat. § 90-21.12. Again, under the highly deferential standard of review applicable to these evidentiary rulings, we must reject Kearney's argument.

"[T]rial courts are afforded a wide latitude of discretion when making a determination about the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (internal quotation marks omitted). The trial court's "ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Id.* A trial court's evidentiary ruling is not an abuse of discretion unless it "was so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.

In a medical malpractice action, the standard of care is defined as "the standards of practice among members of the same health care profession with similar training and experience *situated in the same or similar communities* under the same or similar circumstances at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12(a) (2013) (emphasis added). An expert witness "testifying as to the standard of care" is not required "to have actually practiced in the same community as the defendant," but "the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care in similar communities." *Smith v. Whitmer*, 159 N.C. App. 192, 196, 582 S.E.2d 669, 672 (2003) (citation omitted).

The "critical inquiry" in determining whether a medical expert's testimony is admissible under the requirements of N.C. Gen. Stat. § 90-21.12 is "whether the doctor's testimony, taken as a whole" establishes that he "is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community." *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005).

Here, Dr. Nealon testified that he was familiar with "Beaumont, Texas, where they have a hospital almost identical in size to Forsyth Hospital, and the community itself is almost identical in size." He testified that he was familiar with Beaumont and its demographic information both from his own experience there and from information he read in local newspapers. Dr. Nealon also testified that he was familiar with Wake Forest University Baptist Medical Center, also located in Winston-Salem, and that he had spoken with surgeons there.

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In response, Kearney presented demographic information on Beaumont, Texas, and Winston-Salem, showing that Beaumont and its hospital actually were markedly smaller than Winston-Salem and Forsyth Medical Center. Dr. Nealon did not dispute that information but testified that the population size of Beaumont declined as the result of a recent hurricane and that, in 2009 when Kearney's claim arose, Beaumont and Winston-Salem were similar communities with similar hospitals. When asked, "do you believe that regardless of what the population is today in [Beaumont and Winston-Salem], that you are familiar with the standard of care for Winston-Salem or similar communities as it existed in 2009," Dr. Nealon answered, "Yes, I feel very comfortable about that."

Kearney contends that the demographic differences between Beaumont and Winston-Salem as of 2013 required the trial court to find that the two cities were not similar communities as a matter of law. Kearney supports this argument with analysis of two cases in which this Court held that the similar community requirement of N.C. Gen. Stat. § 90-21.12 was not satisfied.

First, in *Henry v. Southeastern OB-GYN Assocs., P.A.*, this Court held that the similar community requirement was not met where the proffered expert "failed to testify in any instance that he was familiar with the standard of care in Wilmington or similar communities." 145 N.C. App. 208, 210, 550 S.E.2d 245, 246, *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001). The doctor at issue in that case testified that he was familiar with the national standard of care, but was not familiar with Wilmington, North Carolina. *Id.* at 209-10, 550 S.E.2d at 246-47. The doctor practiced in Spartanburg, South Carolina, which the plaintiffs argued was similar to Durham or Chapel Hill, but there was no evidence in the record that Wilmington and Durham or Chapel Hill were the "same or similar." *Id.*

Second, in *Smith v. Whitmer*, this Court held that the similar community requirement was not met where the doctor proffered as an expert "asserted that he was familiar with the applicable standard of care," but "his testimony [was] devoid of support for this assertion." 159 N.C. App. 192, 196, 582 S.E.2d 669, 672 (2003). The doctor in that case "stated that the sole information he received or reviewed concerning the relevant standard of care in Tarboro or Rocky Mount was verbal information from plaintiff's attorney," but he could not "remember what plaintiff's counsel had purportedly told him." *Id.* at 196-97, 582 S.E.2d at 672. He "had never visited Tarboro or Rocky Mount, had never spoken to any health care practitioners in the area, and was not acquainted with

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the medical community.” *Id.* at 197, 582 S.E.2d at 672 (internal quotation marks omitted).

These cases are distinguishable. Here, Dr. Nealon testified that he was familiar with Beaumont, Texas; that he believed Beaumont was similar to Winston-Salem based on his knowledge of Beaumont and demographic statistics for Winston-Salem; that the demographic differences between Beaumont and Winston-Salem as of 2013 were the result of an intervening hurricane that displaced many Beaumont residents; that he has associated with surgeons from Wake Forest University Baptist Medical Center, another hospital in Winston-Salem; and that he felt “very comfortable” that he was “familiar with the standard of care for Winston-Salem or similar communities as it existed in 2009.”

In light of this testimony, we cannot conclude that the trial court’s ruling was “so arbitrary that it could not have been the result of a reasoned decision.” *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723. Thus, under the deferential standard of review applicable to a trial court’s admission of expert testimony, we hold that the trial court did not abuse its discretion in concluding that Dr. Nealon was familiar with the standard of care in communities and hospitals similar to Winston-Salem and Forsyth Medical Center.

IV. Grant of Motion *in Limine* and Denial of Motion to Amend

[5] Lastly, Kearney argues that the trial court erred in granting Dr. Bolling’s motion *in limine* and denying Kearney’s motion to amend her complaint during trial, both of which had the effect of prohibiting Kearney from pursuing a claim based on lack of informed consent. As with Kearney’s other arguments, we are constrained by the narrow standard of review applicable to these arguments.

The standard of review for a trial court’s ruling on a motion in limine is abuse of discretion. *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001); *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff’d per curiam*, 328 N.C. 88, 399 S.E.2d 113 (1991). Likewise, the decision to permit amendment of a complaint during trial rests in the sound discretion of the trial court and “[i]ts decision will not be disturbed on appeal absent a showing of abuse of discretion.” *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996). Thus, as with Kearney’s other arguments on appeal, this Court cannot find error and reverse on these issues unless the trial court’s ruling “was so arbitrary that it could not have been the

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result of a reasoned decision.” *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.²

Kearney first argues that her initial complaint asserted a claim based on lack of informed consent. We disagree. Ordinarily, a complaint need only contain a “short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief.” N.C. R. Civ. P. 8(a)(1) (2013).

But medical malpractice claims are different. Rule 9(j) contains additional requirements for medical malpractice complaints. Rule 9(j) requires a statement that the plaintiff’s medical records have been reviewed “by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.” N.C. R. Civ. P. 9(j)(1). Claims based on lack of informed consent are medical malpractice claims requiring expert testimony and therefore must comply with the requirements of Rule 9(j). *See Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 145 (2001); *see also Clark v. Perry*, 114 N.C. App. 297, 306, 442 S.E.2d 57, 62 (1994); *Nelson v. Patrick*, 58 N.C. App. 546, 548-49, 293 S.E.2d 829, 831 (1982). When a medical malpractice complaint asserts multiple theories of negligence with different standards of care, the expert or experts satisfying the Rule 9(j) requirement must be willing to testify to each applicable standard of care. N.C. R. Civ. P. 9(j)(1).

That did not happen here. Dr. Brickman, the expert who provided Kearney’s Rule 9(j) certification, testified during his deposition that he was not aware Kearney intended to assert an informed consent claim until the issue came up during depositions. He did not review that theory of negligence before the complaint was filed and his opinion forming the basis of Kearney’s Rule 9(j) certification did not address that standard of care.

It is “well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery

2. Kearney argues that the standard of review on these issues should be *de novo* because they involve the trial court’s legal interpretation of Rules 8 and 9 of the North Carolina Rules of Civil Procedure. We agree with Kearney that questions of law, including interpretation of the Rules of Civil Procedure, are reviewed *de novo*. But as explained in our analysis below, the trial court did not err in its understanding of the rules, and its rulings ultimately involved discretionary decisions subject to the abuse of discretion standard.

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subsequently establishes that the statement is not supported by the facts then dismissal is likewise appropriate.” *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008). Applying this legal principle here, we hold that the trial court did not err in concluding that the complaint “did not include the consent issue.” That legal theory could be asserted only if, *before filing the complaint*, Kearney’s expert had reviewed the underlying facts and was willing to testify that Dr. Bolling had not complied with the applicable standard of care concerning informed consent. We know for certain that this did not occur because Kearney’s expert conceded that he was unaware of the informed consent issue until it first came up during discovery. As a result, the trial court did not abuse its discretion in granting the motion *in limine* excluding Kearney’s informed consent evidence from trial.

Kearney also argues that, even if the trial court properly excluded the informed consent evidence initially, the court erred by denying her motion to amend during trial because defense counsel opened the door to this evidence by questioning Kearney about her consent to the medical procedure. As explained below, the trial court did not abuse its broad discretion in denying Kearney’s motion.

Kearney contends that the following questioning by defense counsel opened the door on the issue of informed consent:

DEFENSE COUNSEL: Dr. Bolling came in, talked to you about the operation, and following the recommendation of the emergency department and Dr. Bolling, you consented to have your gallbladder taken out; correct?

KEARNEY: He came in. He did not discuss everything that was to be discussed. When the consent form was handed to me, sir, if you will look back on the first day and how much medication I was given, I was in and out.

DEFENSE COUNSEL: You did sign a consent form; correct?

KEARNEY: I had to be woken up to sign a consent form from all the medicine I was on, sir.

Shortly after this questioning ended, Kearney moved for leave to amend her complaint to add a claim based on lack of informed consent, and the trial court denied the motion. Kearney argues on appeal that her motion should have been granted and that, in any event, the questioning amounted to an amendment by implication under Rule 15(b) of the Rules of Civil Procedure. Rule 15(b) states that “[w]hen issues not raised

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by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” N.C. R. Civ. P. 15(b). The denial of a motion to amend under Rule 15(a) and the refusal to recognize a claim of an amendment by implication under Rule 15(b) both are reviewed for abuse of discretion. *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 629-30, 347 S.E.2d 473, 476 (1986).

We hold that the trial court did not abuse its discretion by refusing to permit Kearney to pursue her informed consent claim for the first time mid-trial. Our case law governing amendments by implication requires that the parties actually litigate the new claim without objection. For example, in *Taylor v. Gillespie*, on which Kearney relies, this Court held that the pleadings were amended by implication to include a claim for resulting trust because the plaintiff introduced “evidence tending to establish the existence of a resulting trust” and the defendant did not object. 66 N.C. App. 302, 305, 311 S.E.2d 362, 364 (1984).

Here, by contrast, the parties did not litigate a claim for lack of informed consent at trial. All the jury heard were two isolated questions concerning the consent form that Kearney signed. Notably, there was no expert testimony concerning the standard of care and no other testimony establishing the elements of a malpractice claim based on the lack of informed consent. Thus, once again, we must conclude that the trial court’s ruling was not an abuse of discretion. The court’s decision not to permit this new theory to enter the case mid-trial rested soundly within the court’s discretion to control the course of trial proceedings. That decision certainly was not “so arbitrary that it could not have been the result of a reasoned decision.” *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.

V. Insufficient Service of Process

Finally, Dr. Bolling argues, as an alternative basis to affirm the judgment, that the trial court erred in denying his motion to dismiss for insufficient service of process. Because we affirm the trial court’s judgment, we need not reach this issue.

Conclusion

The trial court’s evidentiary rulings and its denial of Kearney’s mid-trial motion to amend were within the trial court’s sound discretion. Accordingly, we find no error in the trial court’s judgment.

NO ERROR.

Chief Judge McGEE and Judge McCULLOUGH concur.

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KELLY NICOLE McCAULEY, PLAINTIFF

v.

STEVEN EUGENE THOMAS, BY AND THROUGH PROGRESSIVE UNIVERSAL
INSURANCE COMPANY, INTERVENOR, DEFENDANT

No. COA14-1366

Filed 7 July 2015

**Motor Vehicles—automobile accident—contributory negligence
—knowledge of driver’s intoxication**

In an action for damages allegedly caused by defendant’s negligence in an automobile accident, the trial court erred by determining that plaintiff was grossly negligent as a matter of law and entering a directed verdict in favor of defendant. While plaintiff did voluntarily ride in defendant’s car after defendant had been drinking, plaintiff testified that she did not believe that defendant was intoxicated. There was sufficient evidence for the issue of plaintiff’s contributory negligence to be decided by the jury.

Appeal by plaintiff from order entered 25 July 2014 by Judge Thomas H. Lock in Lee County Superior Court. Heard in the Court of Appeals 6 May 2015.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.

Teague, Rotenstreich, Stanaland, Fox & Holt, P.L.L.C., by Kenneth B. Rotenstreich, for defendant-appellee.

McCULLOUGH, Judge.

Kelly Nicole McCauley (“plaintiff”) appeals from the trial court’s order granting a directed verdict in favor of Steven Eugene Thomas (“defendant”) and intervenor Progressive Universal Insurance Company (“Progressive”) upon finding that plaintiff was grossly contributorily negligent as a matter of law. We reverse.

I. Background

Plaintiff initiated this action against defendant on 4 October 2013 in Lee County Superior Court to recover for injuries she sustained in a single vehicle automobile accident allegedly caused by defendant’s negligence. Specifically, plaintiff alleged the following:

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3. That on January 18, 2012 at approximately 11:44 p.m., the plaintiff was a passenger in a 2006 Ford vehicle owned and operated by the defendant.

4. That on the date and at the time referred to above, the defendant was operating his vehicle east on SR 1469, when he encountered a dead end, struck a tree and a fence, before coming to rest off of the roadway.

5. That the impact of the collision referred to above caused the plaintiff personal injuries.

6. That at the time of the collision described above and immediately prior thereto, the defendant was negligent in that he:

- (a) Failed to keep a proper lookout;
- (b) Failed to reduce speed to the extent necessary to avoid a collision;
- (c) Failed to keep his vehicle under proper control;
- (d) Drove in a careless and reckless manner.

7. That as a proximate result of defendant's negligence and of the collision referred to above, the plaintiff was injured and underwent medical care and treatment and, upon information and belief, will continue to need medical treatment into the future.

8. That as a proximate result of defendant's negligence and of the personal injuries suffered by the plaintiff, she has incurred medical expenses and, upon information and belief, it is alleged that she will continue to incur medical expenses into the future.

9. That as a proximate result of the collision referred to above, the plaintiff has experienced pain, suffering and discomfort and, upon information and belief, it is alleged she will continue to experience pain, suffering and discomfort into the future as a result of the injuries she sustained in the motor vehicle collision.

In response to plaintiff's complaint, defendant filed an answer on 15 January 2014, in which defendant denied all allegations of negligence and, among other defenses, pleaded contributory negligence and

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gross contributory negligence as bars to plaintiff's recovery. Plaintiff responded to defendant's allegations of contributory negligence and gross contributory negligence by asserting defendant had the last clear chance to avoid the accident.

Following the denial of motions to dismiss by defendant, an unsuccessful attempt at mediation, and the intervention of Progressive on behalf of defendant¹, this case came on for jury trial in Lee County Superior Court on 14 July 2014, the Honorable Thomas H. Lock, Judge presiding. Each side called only one witness at trial.

Plaintiff first took the stand and testified that she and defendant were in a relationship at the time of the automobile accident. Plaintiff testified that on the night of the accident, 18 January 2012, she and defendant went on a date to San Felipe, a restaurant in Sanford which was offering a margarita special. Over the course of two hours at the restaurant, plaintiff and defendant ate dinner and drank margaritas. Plaintiff could not recall the exact number of drinks she and defendant consumed, but testified she had no more than three and defendant probably drank one or two more than she did.

Plaintiff testified she and defendant had a good time at dinner and she was feeling the effects of the alcohol by the time they were ready to leave. As a result, plaintiff allowed defendant to drive. When questioned whether she "voluntarily rode with [defendant] after knowing he consumed four or five margaritas in [her] presence," plaintiff responded affirmatively. Yet, plaintiff indicated defendant drank several times a week and was a "far more experienced drinker than [she] was." Plaintiff further testified defendant did not have any problems walking or exiting the restaurant and averred "[defendant] definitely wasn't intoxicated."

From the restaurant, plaintiff and defendant went to defendant's mother's house. Plaintiff indicated she did not complain about defendant's driving between the restaurant and defendant's mother's house. Plaintiff and defendant were at defendant's mother's house for approximately an hour and a half. Plaintiff testified that, to her knowledge, defendant did not consume any alcohol after leaving the restaurant. Yet, plaintiff acknowledged defendant was not in her presence for the entire time they were at defendant's mother's house.

1. Progressive, who was defendant's liability insurer at the time of the accident, was allowed to intervene and represent the interests of defendant, who was unable to cooperate in this proceeding due to his incarceration out of state.

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From defendant's mother's house, plaintiff and defendant traveled to plaintiff's house on the other side of Sanford, a thirty-five to forty minute drive. Defendant drove as plaintiff was still feeling the effects of the alcohol. Again, plaintiff indicated she voluntarily rode with defendant.

Plaintiff testified that on the way to her house, she and defendant got into an argument. Plaintiff could not remember what the argument was about, but recalled that it was a silly argument. Plaintiff indicated defendant was driving poorly at the time. As a result of defendant's poor driving and because he was yelling at her, plaintiff told defendant to pull over and let her out. Plaintiff testified defendant did pull over, but the downtown area of Sanford where he pulled over was not an area a single female would want to be late at night. Thus when defendant apologized and said he would not say another word and would just take plaintiff home and drop her off, plaintiff agreed.

Plaintiff testified they were silent the rest of the way until they made the turn onto West Forest Oaks near plaintiff's house. After making a normal turn onto West Forest Oaks, plaintiff said defendant "just blew up." Plaintiff testified defendant "gassed it immediately[]" and accelerated the vehicle to 35 to 45 miles per hour. Plaintiff explained,

it's like a bomb went off inside of him or something. He turns on the road, and he gases [sic] the car. And it's not a very long road. It's a dead end. There's like a little guard rail and little reflector signs at the bottom. He sees, and he's yelling, and he's screaming, and I'm just – I'm apologizing, trying to get him to stop.

Upon further questioning, plaintiff testified "[i]t wasn't like a gradual like, you know, like a normal you gradually get up to 35 miles an hour." When defendant pointed out that plaintiff testified about different speeds, plaintiff admitted she did not know the exact speed, but explained the last time she looked over she saw they were going 35 miles per hour and defendant was still accelerating. Plaintiff recalled "apologizing, begging [defendant] to just please stop, please slow down." Then they crashed.

Although plaintiff's recollection of the actual collision was poor, plaintiff remembered going forward and to the left and hitting her head on the gear shifter and the console that it sits in. The next things plaintiff remembered were police officers and being in the hospital. Plaintiff suffered injuries to her face, jaw, and mouth as a result of the accident.

At the conclusion of the plaintiff's attorney's questioning of her, plaintiff reiterated that she did not observe anything prior to the accident

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or argument that would have led her to believe defendant was driving in an impaired condition. Plaintiff did not observe anything about defendant's speech that caused alarm, did not observe defendant's eyes being glassy, and did not think defendant was unsteady on his feet.

Plaintiff rested following plaintiff's testimony, at which time defendant moved for a directed verdict on the ground that plaintiff was grossly contributorily negligent as a matter of law. In support of his motion, defendant reiterated portions of plaintiff's testimony, cited several cases standing for the proposition that a passenger who knows or should know that a driver is intoxicated cannot recover for injuries sustained from riding with the driver, and argued the following:

[Plaintiff], by her own testimony, has admitted she should have known, and because of that, I ask that the Court grant directed verdict in favor of the [d]efendant finding that, even if the other issues are resolved in favor of the [p]laintiff, that, under the facts of this case, given their presence together from before dinner to the time of the wreck, given the amount of alcohol consumed in each other's presence with no evidence of alcohol being consumed outside of each other's presence, given his erratic driving before he pulled over on McIver Street, and her decision to stay in the car with him, given their argument that occurs when they're intoxicated and her decision to stay in the car with him, that she knew or should have known of his intoxication.

After considering the cases submitted by defendant and the arguments by both sides, the trial court denied defendant's motion for a directed verdict at the conclusion of plaintiff's evidence. The trial court explained that,

[w]hile the evidence certainly is that the [p]laintiff herself had consumed such a quantity of alcohol that, by her own admission, she should not drive as they left the restaurant, and as they left [d]efendant's mother's home and though the evidence is that [d]efendant Thomas had consumed more alcohol than she, the evidence at this point is that she saw nothing in his conduct or behavior to cause her to conclude that he shouldn't drive.

I note that there's no evidence concerning the relative size of the [d]efendant as compared to the [p]laintiff. There was some evidence that he was a more experienced drinker

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than she. I suppose from that it can be inferred that he had a higher tolerance than she.

I also have carefully reviewed at least my notes concerning testimony regarding his driving, and it does appear that, while there is some conflict, I believe that conflict should be resolved in favor of the [p]laintiff at this point, and she did testify on direct before this Court that there was nothing about his driving, speech, or conduct that caused her any concern before the argument.

And while she did demand to get out of the car on McIver Street, it appears at this point that that was because of the argument and not because of concern over his alcohol consumption. So again, . . . looking at the evidence in the light most favorable to the [p]laintiff, at this point [d]efendant's motion for directed verdict is denied.

The defense then called N.C. State Trooper Brian Crissman as its only witness. After testifying about his training to identify impairment, Crissman testified that he responded to plaintiff and defendant's accident on 18 January 2012. Crissman stated he spoke with defendant at the scene and later at the hospital. Crissman testified that, during his time with defendant at the hospital approximately two hours after the accident, he observed several signs of alcohol use or intoxication including glassy eyes, slurred speech, and combativeness. Crissman further testified that while conversing with defendant, he got pretty close to defendant's face and could smell the odor of alcohol on defendant's breath. Concerning his interactions with defendant at the accident scene, Crissman testified that he administered two breath tests to defendant using an alco-sensor and both tests were positive for alcohol. Based on his observations at the scene and at the hospital, Crissman opined that defendant was sufficiently impaired by alcohol to impair his ability to drive, adding that "[defendant] was obviously impaired, visibly impaired."

Yet on cross-examination, Crissman acknowledged defendant sustained a head injury in the accident and was unconscious when he arrived to the accident scene. Crissman testified medical personnel removed defendant from the vehicle and transported him to the hospital. As a result, Crissman never saw defendant in a standing position and was unable to perform further field sobriety tests. Crissman indicated he was not a medical professional but had some training on head injuries and acknowledged a head injury could affect or aggravate a person's attitude or combativeness. Crissman further acknowledged defendant

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had been in treatment for thirty to forty minutes at the hospital before he arrived and he was unsure what medications were administered to defendant. Nevertheless, Crissman testified on re-direct examination that there was no question in his mind that defendant was intoxicated, regardless of any injuries sustained.

At the conclusion of the evidence, the defense renewed its motion for a directed verdict arguing there was now evidence in the record that defendant was impaired. Specifically, the defense argued the evidence of impairment went directly to what plaintiff should have known before she voluntarily rode with defendant and, coupled with the evidence that all alcohol consumed by defendant was consumed in the presence of plaintiff, plaintiff felt the effects of the alcohol she consumed and knew defendant had consumed more alcohol, plaintiff and defendant were arguing over something silly, and defendant was driving erratically which caused plaintiff to make defendant stop the vehicle, left nothing for the jury to decide under the law of contributory negligence and gross contributory negligence in North Carolina.

Upon consideration of the arguments, the trial court allowed defendant's motion for a directed verdict on the basis of gross contributory negligence and ordered defendant to draft the order. The trial court then filed a written order on 25 July 2014. Plaintiff filed notice of appeal on 18 August 2014.

II. Discussion

As a preliminary issue, the defense notes that, contemporaneously with its appellate brief, it filed a motion to dismiss this appeal on the basis that plaintiff's appellate brief was untimely filed. Defendant's motion was denied by order of this Court on 12 March 2015 and we do not address the issue any further.

Now on appeal, plaintiff argues the trial court erred in directing a verdict in favor of defendant. "A motion for a directed verdict by a defendant pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) 'tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff.' " *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 88, 555 S.E.2d 303, 305 (2001) (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)). "The standard of review of directed verdict is whether the evidence . . . is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

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In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). Specifically to the issue in this case,

[t]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.

Clark v. Bodycombe, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976).

Plaintiff contends the trial court erred in entering a directed verdict in favor of defendant on the basis of gross contributory negligence because there was no evidence plaintiff was grossly negligent. In the alternative, plaintiff argues, at the very least, the issue of gross contributory negligence should have been submitted to the jury.

"In this state, a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73-74 (1992). Yet, a plaintiff's contributory negligence does not bar recovery from a defendant who is grossly negligent. *See id.*; *see also Pearce v. Barham*, 271 N.C. 285, 289, 156 S.E.2d 290, 294 (1967). Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent. *See Harrington v. Collins*, 298 N.C. 535, 538, 259 S.E.2d 275, 278 (1979) ("[I]t is the majority rule, and we think the better reasoned rule, that plaintiff's willful or wanton negligence is a defense in an action seeking recovery for injuries caused by defendant's willful or wanton conduct."). Gross negligence is willful and wanton negligence.

An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference

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to the rights of others. An act is wilful when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, a duty assumed by contract or imposed by law.

Boyd v. L. G. DeWitt Trucking Co., Inc., 103 N.C. App. 396, 402, 405 S.E.2d 914, 918 (1991) (internal citations and quotation marks omitted). “The concept of wilful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct.” *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978)). “The issue of gross negligence should be submitted to the jury if there is substantial evidence of the defendant’s wanton and/or wilful conduct.” *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 670, 486 S.E.2d 472, 474 (1997), *rev’d on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998).

Upon review of the record in this case, we hold the trial court’s grant of a directed verdict in favor of defendant on the basis that plaintiff was grossly contributorily negligent was error; at the very least, the issues of defendant’s negligence, defendant’s gross negligence, and plaintiff’s gross contributory negligence should have been decided by the jury.

Defendant cites various cases that stand for the well-established North Carolina rule that,

a passenger is contributorily negligent as a matter of law so to bar recovery in a negligence suit when (1) the driver of the vehicle was under the influence of an intoxicant; (2) the passenger knew or should have known that the driver was under the influence; and (3) the passenger voluntarily rode with the driver even though she knew or should have known that the driver was under the influence.

Kennedy v. Polumbo, 209 N.C. App. 394, 403, 704 S.E.2d 916, 924 (2011) (citing *Coleman v. Hines*, 133 N.C. App. 147, 149, 515 S.E.2d 57, 59, *disc. review denied*, 350 N.C. 826, 539 S.E.2d 281 (1999)); *see also Lee v. Kellenberger*, 28 N.C. App. 56, 59, 220 S.E.2d 140, 143 (1975). “In determining whether the passenger knew or should have known that the driver was under the influence, our courts apply an ‘ordinary prudent man’ standard.” *Id.* Although the North Carolina rule is clear, the evidence in this case was not conclusive on the issue of defendant’s impairment. Consequently, the evidence could not have been conclusive on the issue of plaintiff’s contributory negligence based on whether plaintiff knew or should have known defendant was impaired, much less gross contributory negligence.

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While it is clear that defendant consumed alcohol in plaintiff's presence, there is conflicting evidence of whether defendant was impaired and whether the accident was the result of defendant's alleged impairment. In fact, in filing this action against defendant, plaintiff did not include any reference to alcohol consumption in the complaint and did not proceed on a theory that defendant was negligent as a result of driving while impaired. Plaintiff alleged defendant was negligent in that defendant "[f]ailed to keep a proper lookout[,]" "[f]ailed to reduce speed to the extent necessary to avoid a collision[,]" "[f]ailed to keep his vehicle under proper control[,]" and "[d]rove in a careless and reckless manner." The issue of impairment was not raised until defendant asserted contributory negligence and gross contributory negligence as bars to plaintiff's recovery.

Although plaintiff, by her own admission, was impaired by alcohol and the evidence was that defendant consumed one or two more drinks than plaintiff, the evidence also indicated defendant drank several times a week, plaintiff did not drink that much, and defendant was a "far more experienced drinker than [plaintiff] was." Moreover, plaintiff testified defendant was not intoxicated. Plaintiff stated she did not notice anything about defendant's speech that caused alarm, she did not observe that defendant's eyes were glassy, and she did not observe that defendant was unsteady on his feet. Plaintiff testified she did not witness anything that led her to believe defendant was driving in an impaired condition. On the other hand, Trooper Crissman testified he was trained to identify impairment and testified defendant was impaired. Crissman based his opinion on the facts that defendant twice tested positive for alcohol on breath tests administered using an alco-sensor at the accident scene and defendant exhibited several signs of alcohol use or intoxication at the hospital hours after the accident. Those signs included glassy eyes, slurred speech, combativeness, and an odor of alcohol on defendant's breath that Crissman noticed when he got close to defendant's face. Crissman acknowledged, however, that defendant had been knocked unconscious during the accident and had suffered a head injury. Although Crissman testified he could distinguish between signs of impairment and the injuries, he acknowledged defendant's head injury could affect or aggravate some symptoms. No evidence of defendant's blood alcohol content was introduced.

Additionally, as noted by the trial court when it denied defendant's motion for a directed verdict at the conclusion of plaintiff's evidence, the evidence suggests plaintiff did not have any concern over defendant's driving prior to the argument and, although plaintiff demanded

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defendant pull over and let her out, plaintiff's demand appeared to be a reaction to the argument. Lastly, the evidence also suggests that plaintiff had no issue with defendant's driving between the time he pulled over to let plaintiff out and when he pulled onto West Forest Oaks near plaintiff's house. Plaintiff testified defendant made a normal turn onto West Forest Oaks and then "just blew up" and "gassed it immediately."

Viewing the above evidence and accompanying inferences in the light most favorable to plaintiff, we hold the evidence was sufficient in this case to have gone to the jury. Instead, the trial court invaded the province of the jury and determined the facts and granted defendant's motion for a directed verdict. This was error.

Moreover, even if the evidence was conclusive on the issue of defendant's impairment and plaintiff was contributorily negligent as a matter of law in that she voluntarily chose to ride with defendant when she knew or should have known defendant was impaired, evidence existed in this case to raise the issue of gross negligence by defendant for jury determination. *See Yancey v. Lea*, 354 N.C. 48, 53-54, 550 S.E.2d 155, 158 (2001) ("Our case law as developed to this point reflects that the gross negligence issue has been confined to circumstances where at least one of three rather dynamic factors is present: (1) defendant is intoxicated; (2) defendant is driving at excessive speeds; or (3) defendant is engaged in a racing competition.") (internal citations omitted). Thus, ordinary contributory negligence by plaintiff would not preclude her recovery.

We understand that because the trial court found plaintiff grossly contributorily negligent as a matter of law, it would have been futile to allow the jury to determine whether defendant was negligent or grossly negligent because no matter the level of defendant's negligence, the trial court's determination that plaintiff was grossly contributorily negligent would bar her recovery. However, upon review we do not think the evidence supports a determination that plaintiff was grossly contributorily negligent as a matter of law.

In support of his argument that plaintiff was grossly contributorily negligent, defendant relies on *Coleman v. Hines*, 133 N.C. App. 147, 515 S.E.2d 57 (1999). In *Coleman*, a wrongful death case arising from a car accident in which the passenger was killed after the passenger and driver had consumed alcohol together at a party, this Court first held the trial court did not err in granting summary judgment as to the issue of negligence of both the driver and the passenger based on the following undisputed facts:

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(1) [the driver] was drinking early on the afternoon of the accident when he stopped by to see [the passenger] at her place of employment at Domino's Pizza; (2) according to [the passenger's employer], . . . [the passenger] knew [the driver] was drinking when he stopped by Domino's, and [the passenger] also stated that they planned to drink that evening on their way to an engagement party, during the party, and following the party; (3) [the passenger's employer] begged [the passenger] not to ride with [the driver] that night, and repeatedly offered to pick them up at the party and drive them home, no matter how late they stayed at the party; (4) when [the driver] picked up [the passenger] later that evening, they went to a convenience store and purchased a 12-pack of beer, which they drank in each other's presence over the evening; (5) the only alcohol [the driver] drank that evening was consumed in [the passenger's] presence; (6) at the time of the accident, [the driver] blood-alcohol content was at least .184, more than twice the legal limit, according to the treating physician . . . ; and (7) it was obvious to the officer investigating the accident, . . . who arrived about three minutes after the accident, that [the driver] was under the influence of alcohol at the time of the accident.

Id. at 149, 515 S.E.2d at 59. This Court then addressed whether the driver was grossly negligent and held, "to the extent that the evidence establishes willful and wanton negligence on the part of [the driver], it also establishes a similarly high degree of contributory negligence on the part of [the passenger]." *Id.* at 151, 515 S.E.2d at 60 (internal quotation marks omitted). Thus, this Court held the passenger could not prevail.

Defendant contends the evidence in the present case was similar to the evidence in *Coleman* in that plaintiff consumed alcohol with defendant, voluntarily rode in the vehicle defendant was driving, defendant's breath tests following the accident were positive for the presence of alcohol, and Crissman stated he observed signs of intoxication. Thus, defendant argues for the same result – that no matter the level of defendant's negligence, plaintiff's negligence rose to the same level.

In deciding *Coleman*, the court made clear that its decision was based on the "facts of [the] case[.]" *Id.* at 152, 515 S.E.2d at 60. We find this case distinguishable. Specifically, we note that the undisputed facts in *Coleman* revealed that the passenger was aware that the defendant had been drinking all day, the passenger was offered and refused an

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alternative ride from her concerned employer who warned her not to ride with the driver, and the driver's blood alcohol content was at least .184, more than twice the legal limit. This evidence from *Coleman* showed the driver was appreciably impaired and there was concern expressed to the passenger about riding with the driver. In the present case, there was no such evidence. Even if defendant was impaired and plaintiff knew or should have known defendant was impaired, the evidence in this case is not sufficient to determine as a matter of law that plaintiff's contributory negligence rose to the level of gross contributory negligence. Moreover, the evidence suggests plaintiff had no concern about defendant's driving until their argument, or following the argument until after defendant turned onto West Forest Oaks when defendant "just blew up" and rapidly accelerated. We think this evidence, separate and apart from any evidence of impairment, was sufficient to raise the issue of defendant's gross negligence in that it manifests a reckless indifference to the rights of plaintiff.

In addition to challenging the trial court's grant of a directed verdict in favor of defendant, plaintiff contends the trial court erred in failing to present the issues of defendant's gross negligence and last clear chance to the jury.² Concerning defendant's gross negligence, the basis of the trial court's directed verdict foreclosed the need to consider the issue. Concerning last clear chance, although plaintiff filed a reply asserting defendant had the last clear chance to avoid the accident, plaintiff did not argue the issue below and has waived the issue on appeal.

Having already concluded the trial court erred in granting the directed verdict in favor of defendant, any further analysis on these issues would be merely advisory, and we do not offer advisory opinions. See *Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts . . . to give advisory opinions . . ."). Thus, we do not address these issues further.

III. Conclusion

As discussed, it appears the trial court invaded the province of the jury and decided the material facts of this case. Accordingly, we hold the

2. In response to plaintiff's second and third issues on appeal, defendant argues the issues were not preserved for review citing N.C. R. App. P. 10(a) for the proposition that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]" Defendant, however, carelessly cites an old version of Rule 10. Following amendments to the appellate rules in 2009, review on appeal is no longer limited to assignments of error noted in the record.

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trial court erred in entering a directed verdict on the basis that plaintiff was grossly contributorily negligent. Plaintiff is entitled to a new trial.

NEW TRIAL.

Judge STEELMAN concurs. Concurred prior to 30 June 2015

Judge STEPHENS concurs.

BARBARA ANN MURPHY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
DONALD JAMES WILLIS, DECEASED, PLAINTIFF

v.

KEITH D. HINTON, SR., AND HERITAGE PROPANE EXPRESS, LLC,
D/B/A HERITAGE PROPANE, DEFENDANTS

No. COA14-1230

Filed 7 July 2015

1. Pleadings—notice requirements—not satisfied

Plaintiff failed to comply with the rudimentary notice pleading requirement of N.C.G.S. § 1A-1, Rule 8(a)(1) in a negligence action against a provider of propane arising from a carbon monoxide poisoning death in a barn. The complaint referred to “aforementioned negligence,” but there was no mention of any duty owed by defendant, no allegation of unreasonable conduct, and no other reference to the essential elements of a negligence cause of action.

2. Statutes of Limitation and Repose—voluntary dismissal and refile—tolling—initial pleading requirements not satisfied

The trial court properly dismissed a refiled complaint where the statute of limitations had expired and the initial complaint did not satisfy N.C.G.S. § 1A-1, Rule 8(a)(1)’s pleading requirements. In order to benefit from the one-year filing extension provided in Rule 41(a), the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10 and 11 of the North Carolina Rules of Civil Procedure (but Rule 12(b)(6) is not a rule setting out a pleading requirement).

Appeal by plaintiff from order entered 24 July 2014 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 17 March 2015.

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[242 N.C. App. 95 (2015)]

Robert J. Reeves, PC, by Robert J. Reeves, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLC, by Allen C. Smith and M. Duane Jones, for defendant-appellee Heritage Propane.

DIETZ, Judge.

The issue raised in this appeal is whether a complaint that does not satisfy the notice pleading requirements of Rule 8(a)(1) can benefit from the one-year filing extension of Rule 41(a)(1) following a voluntary dismissal. Our Supreme Court has held that “in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year ‘extension’ by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform *in all respects* to the rules of pleading.” *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986) (emphasis added).

[1] Here, Plaintiff asserted that Defendant Heritage Propane Express is in the business of selling, installing, and maintaining propane tanks, including the propane tank located in Defendant Keith Hinton’s barn. The complaint also alleges that Donald Willis, Plaintiff’s son, died of carbon monoxide poisoning while sleeping in that barn. Finally, the complaint alleges that “by reason and consequence of the aforementioned negligence, carelessness, recklessness, and/or willfulness” Plaintiff is entitled to relief.

But there is no “aforementioned” negligence. There is no mention of any duty owed by Heritage Propane, no allegation of unreasonable conduct, and no other reference to the essential elements of a negligence cause of action. Indeed, the complaint does not even allege that Heritage Propane’s propane tank was the source of the carbon monoxide that killed Willis. Heritage Propane cannot possibly prepare a defense to a complaint that does not even disclose what claims are being asserted against it. Accordingly, we hold that Plaintiff failed to comply with the rudimentary notice pleading requirement of Rule 8(a)(1).

[2] Under *Estrada*, Plaintiff’s failure to conform to this foundational pleading requirement prevents application of Rule 41(a)(1)’s one-year filing extension. Accordingly, for the reasons discussed below, we affirm the trial court’s order granting Heritage Propane’s motion to dismiss Plaintiff’s second complaint based on the statute of limitations.

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Facts and Procedural History

On 21 June 2012, Plaintiff Barbara Ann Murphy filed a wrongful death complaint against Defendant Heritage Propane Express.

The complaint began by describing Heritage Propane as “in the business of inspecting, maintaining, installing, and selling at retail to members of the public various types of propane tanks, propane heaters and various equipment, including the propane tank that was installed in the home and barn of Defendant Hinton.”

The complaint then alleged the following sequence of events: That on 15 November 2010, Decedent Donald James Willis arrived at Keith Hinton’s home at approximately 3:30 a.m. and spent the night in the upstairs area of Hinton’s barn. Around 7:35 a.m., Hinton’s girlfriend, Stacy Brown, went to check on Willis. Brown smelled fumes, turned off the propane heater in the barn, and then discovered Willis unresponsive. Brown called 911. The responding firemen found high levels of carbon monoxide in the barn. Willis was transported to the hospital where he was pronounced dead. These factual allegations in the complaint do not mention Heritage Propane or any actions or omissions by Heritage Propane.

After these allegations, under headings labeled “For a First Cause of Action (Survivorship Action, N.C.G.S. § 28A-18-2)” and “For a Second Cause of Action (Wrongful Death Cause of Action, N.C.G.S. § 28A-18-1),” the complaint alleges

That by reason and consequence *of the aforementioned negligence, carelessness, recklessness, and/or willfulness* and as a direct and proximate result thereof, Decedent was injured, suffered severe physical harm from which he subsequently died . . .

. . .

That by reason and consequence *of the aforementioned negligence, carelessness, recklessness, and/or willfulness* and as a direct and proximate result thereof, Decedent’s heirs were harmed or damaged . . .

Despite the reference to the “aforementioned negligence, carelessness, recklessness, and/or willfulness,” no portion of the complaint describes any act or omission by Heritage Propane that could constitute negligence or similar tort liability. The only reference to Heritage Propane is the allegation that it is “in the business of inspecting, maintaining, installing, and selling . . . propane tanks . . . including the propane tank

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that was installed in the home and barn of Defendant Hinton.” There is no allegation, for example, that Heritage Propane negligently designed, manufactured, or installed the propane tank at the Hinton barn; no allegation the Heritage Propane breached some duty to maintain or repair the tank to keep it in a safe condition; and no allegation that Heritage Propane failed to warn the deceased about some unreasonably dangerous condition of the propane tank of which it was aware.

Murphy voluntarily dismissed the complaint on 4 October 2012 and refiled the same complaint on 30 August 2013. The allegations in the refiled complaint were identical to those in the original complaint.

On 31 December 2013, Murphy amended her complaint. The amended complaint was far more detailed, listing for the first time allegations that “employees of Heritage Propane Express, LLC, either individually or in combination, were negligent in the following respects, with regard to the installation, maintenance, repair, or updating of the propane heating system, which heated the building in which Donald Willis suffered the fatal exposure to carbon monoxide gas.” The complaint then includes a list of allegations for “substandard and not properly sealed” drilling holes, “haphazardly” installed equipment, improper ventilation, improper permitting, improper maintenance of ventilation pipes, and improper inspection.

On 27 May 2013, Heritage Propane filed a motion to dismiss Murphy’s complaint based on the statute of limitations. The company argued that Murphy’s August 2013 complaint and December 2013 amended complaint were filed outside the two-year statute of limitations period for wrongful death actions, which began to run on 15 November 2010. Heritage Propane also argued that Murphy’s voluntary dismissal of her initial complaint did not provide a one-year period in which to refile under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. The company contended that a complaint that fails to state a claim on which relief can be granted cannot benefit from the one-year tolling period in Rule 41(a). The trial court agreed with Heritage Propane’s arguments and granted the motion to dismiss. Murphy timely appealed.

Analysis

Ordinarily, when a plaintiff voluntarily dismisses her complaint under Rule 41(a)(1), “a new action based on the same claim may be commenced within one year after such dismissal.” N.C. R. Civ. P. 41(a)(1) (2013). As a result, “[i]f the action was originally commenced within the period of the applicable statute of limitations, it may be recommenced within one year after the dismissal, even though the base period may

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have expired in the interim.” *Brisson v. Santoriello*, 351 N.C. 589, 594, 528 S.E.2d 568, 571 (2000).

But this one-year extension of the time for filing only applies if the complaint properly states a claim for relief. Our Supreme Court has held that “Rule 41(a)(1) must be applied in conjunction with the rules for drafting and certification of pleadings.” *Estrada v. Burnham*, 316 N.C. 318, 322, 341 S.E.2d 538, 541 (1986). Thus, “in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year ‘extension’ by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform *in all respects* to the rules of pleading.” *Id.* at 323, 341 S.E.2d at 542 (emphasis added).

In *Estrada*, the plaintiff filed a “bare bones” complaint and then immediately filed a voluntary dismissal of the complaint. *Id.* at 319, 341 S.E.2d at 540. The file stamps on the two documents showed they were filed only two minutes apart. *Id.* Although the complaint stated a claim for relief (and thus complied with the pleading requirements of Rule 8 of the Rules of Civil Procedure), the Supreme Court held that the plaintiff’s complaint violated the good-faith filing requirements of Rule 11 because the plaintiff never intended to pursue the original complaint and filed it solely to dismiss it and gain the additional one year “extension” on the statute of limitations. *Id.* at 322-23, 341 S.E.2d at 541-42.

The Court concluded that “in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year ‘extension’ by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including Rule 11(a).” *Id.* at 323, 341 S.E.2d at 542. Because plaintiff’s complaint did not conform to Rule 11(a), the Supreme Court held that the trial court properly dismissed the complaint based on expiration of the statute of limitations. *Id.* at 325-26, 341 S.E.2d at 543.

Importantly, although *Estrada* involved a violation of Rule 11(a), the Supreme Court stated that “Rule 41(a)(1) must be applied in conjunction with *the rules for drafting and certification of pleadings*” generally and that to benefit from the one-year extension “the complaint must conform *in all respects to the rules of pleading*, including Rule 11(a).” *Id.* at 322-23, 341 S.E.2d at 541-42. Thus, *Estrada* established that failure to comply with other “rules of pleading,” beyond Rule 11(a), likewise prevents the one-year savings provision from taking effect.

This Court confirmed that portion of the *Estrada* holding in *Robinson v. Entwistle*, 132 N.C. App. 519, 523, 512 S.E.2d 438, 441 (1999). In *Robinson*, the plaintiff failed to comply with the expert certification

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requirement of Rule 9(j). *Id.* This Court held that, under *Estrada*, “Rule 41(a)(1) is only available in an action where the complaint complied with *the rules which govern its form and content* prior to the expiration of the statute of limitations.” *Id.* (emphasis added). As a result, this Court affirmed summary judgment based on the statute of limitations because “a voluntary dismissal without prejudice which ordinarily would allow for another year for re-filing was unavailable to plaintiff in this case.” *Id.*

Taken together, *Estrada* and *Robinson* establish that to benefit from the one-year filing extension provided in Rule 41(a), the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10 and 11 of the North Carolina Rules of Civil Procedure.¹ These four rules govern the “form and content” of pleadings and are appropriately entitled “General rules of pleadings,” “Pleading special matters,” “Form of pleadings,” and “Signing and verification of pleadings,” respectively.

Applying *Estrada* and *Robinson* here, the one-year extension provided by Rule 41(a) is unavailable to Murphy. There is no more fundamental “rule of pleading” than the foundational requirement of Rule 8(a)(1). Rule 8(a)(1) requires a complaint to contain “[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief.” N.C. R. Civ. P. 8(a)(1). To satisfy Rule 8(a)(1), a complaint must provide “sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought.” *Wake Cnty. v. Hotels.com, L.P.*, ___ N.C. App. ___, ___, 762 S.E.2d 477, 486 (2014).

Here, Murphy’s initial complaint failed to show that she is entitled to relief as required by Rule 8(a)(1). The complaint alleged that Heritage Propane is “in the business of inspecting, maintaining, installing, and selling at retail to members of the public various types of propane tanks, propane heaters and various equipment, including the propane tank that was installed in the home and barn of Defendant Hinton.” The complaint also alleged that Willis died of carbon monoxide poisoning inside Defendant Hinton’s barn. And the complaint alleged that Willis died “by reason and consequence of the aforementioned negligence, carelessness, recklessness, and/or willfulness.”

1. Heritage Propane asks this Court to extend *Estrada* to the pleading requirement of Rule 12(b)(6) as well. But Rule 12(b)(6) is not a rule setting out a pleading requirement. It is a rule providing the procedure for seeking dismissal for failure to comply with the pleading requirements of Rules 8 and 9.

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But the complaint does not include any “aforementioned” negligence. There is no allegation that Heritage Propane owed any duty to Willis nor any claim that the propane tank installed in Hinton’s barn was defective, unreasonably dangerous, improperly installed, or negligently maintained. Indeed, the complaint does not even allege that Heritage Propane’s propane tank was the source of the carbon monoxide that allegedly killed Willis.

As a result, the complaint does not satisfy Rule 8(a)(1)’s pleading rules. Heritage Propane cannot “answer and prepare for trial” against a claim for “aforementioned” negligence without knowing what that alleged “aforementioned” negligence is. *See Hotels.com*, ___ N.C. App. at ___, 762 S.E.2d at 486. Likewise, the complaint does not “allow for the application of the doctrine of *res judicata*” because it does not identify the claim being brought: is it negligent design and manufacture of the propane tank? Failure to warn? Negligent installation? Negligent maintenance and repair? The complaint does not say and thus fails to comply with Rule 8(a)(1). *See id.*

Because Murphy’s complaint failed to satisfy Rule 8(a)(1) and thus did not “conform in all respects to the rules of pleading,” the one-year tolling provision in Rule 41(a)(1) is unavailable to her. *Estrada*, 316 N.C. at 323, 341 S.E.2d at 542. As a result, the trial court properly dismissed her refiled complaint—filed roughly a year after the voluntary dismissal—because that complaint was well outside the applicable two-year statute of limitations.

Because we affirm the trial court’s order, we need not address Heritage Propane’s alternative ground to affirm based on Murphy’s second amended complaint and the inapplicability of the “relation back” doctrine in Rule 15(c) of the Rules of Civil Procedure.

Conclusion

We affirm the trial court’s order granting Heritage Propane’s motion to dismiss based on the statute of limitations.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

IN THE COURT OF APPEALS

NEUSOFT MED. SYS., USA INC. v. NEUISYS, LLC

[242 N.C. App. 102 (2015)]

NEUSOFT MEDICAL SYSTEMS, USA, INC., PLAINTIFF

v.

NEUISYS, LLC, DEFENDANT

NEUISYS, LLC, COUNTERCLAIM-PLAINTIFF

v.

NEUSOFT MEDICAL SYSTEMS, USA, INC., TOM BUSE, AND KEITH MILDENBURGER,
COUNTERCLAIM-DEFENDANTS

NEUISYS, LLC, THIRD-PARTY PLAINTIFF

v.

NEUSOFT MEDICAL SYSTEM COMPANY, LTD., THIRD-PARTY DEFENDANT

No. COA14-779

Filed 7 July 2015

1. Appeal and Error—interlocutory orders and appeals—arbitration—substantial right

The merits of an appeal were considered in a case involving commercial confidential information where an order did not resolve all of the issues but the effect of the order was to require Neusoft China to defend two of six claims in court rather than in arbitration. The right to arbitrate was substantial.

2. Appeal and Error—interlocutory orders and appeals—arbitration—non-signatories to original arbitration agreement

The Court of Appeals had jurisdiction to review the merits of appeals from interlocutory orders from Neusoft USA and two former employees of Neusoft China where they were not parties to the original arbitration agreement. By operation of common law agency and contract principles, a contractual right to arbitrate may become enforceable by or against a non-signatory to the agreement.

3. Judges—reconsideration of interlocutory order—purported change in theory of case

The trial court did not err in denying Neusoft China's renewed motion to stay litigation in a case involving confidential commercial information. One trial court judge has the authority to reconsider an interlocutory order entered by another trial court judge only in the limited situation where there was a showing of a substantial change in circumstances. In this case, Neusoft China pointed to a change in the theory of the claims; however the purported change in theory

NEUSOFT MED. SYS., USA INC. v. NEUISYS, LLC

[242 N.C. App. 102 (2015)]

was merely a statement of one way that the confidential information was used.

4. Estoppel—applicability of arbitration agreement—other claims

The trial court did not err by not concluding that the N.C. distributor of medical imaging equipment was equitably estopped from denying applicability of an arbitration clause in a distribution agreement to claims for breach of a non-disclosure agreement and for unfair and deceptive practices. The N.C. distributor was not simultaneously denying the enforceability of the arbitration clause in the distribution agreement while also claiming a right under the distribution agreement.

5. Arbitration and Mediation—arbitration—claim not made in pleading

The trial court did not err by denying motions to stay claims not subject to arbitration pending arbitration of other claims. Although Neusoft USA and Buse and Mildenerberger claimed that a portion of the damages sought by the N.C. distributor was dependent on an issue to be arbitrated, they made no such claim in their pleadings for damages.

Appeal by Neusoft Medical Systems Co., Ltd. (“Neusoft China”); Neusoft Medical Systems, U.S.A., Inc. (“Neusoft USA”); and Tom Buse and Keith Mildenerberger from orders entered 10 January 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 5 February 2015.

Van Laningham Duncan PLLC, by Alan W. Duncan and Stephen M. Russell, Jr., for the Third-Party Defendant-Appellant.

Kilpatrick Townsend & Stockton LLP, by Daniel R. Taylor, Jr., and Susan H. Boyles, for the Plaintiff/Counterclaim Defendant-Appellant.

Wall Esleeck Babcock LLP, by J. Dennis Bailey and Joseph T. Carruthers, for the Counterclaim Defendant-Appellants.

Womble Carlyle Sandridge & Rice, LLP, by Brent F. Powell and Philip J. Mohr, for the Defendant/Counterclaim Plaintiff/Third-Party Plaintiff-Appellee.

NEUSOFT MED. SYS., USA INC. v. NEUISYS, LLC

[242 N.C. App. 102 (2015)]

Ellis & Winters LLP, by Jonathan A. Berkelhammer, Matthew W. Sawchak, and Kelly Margolis Dagger, for Amicus Curiae, the North Carolina Association of Defense Attorneys.

DILLON, Judge.

This dispute involves a business relationship between China-based Neusoft China, a manufacturer of medical imaging equipment (e.g., CT scanners) and North Carolina-based Neuisys, LLC (“NC Distributor”), a distributor of Neusoft China equipment in the United States.

In this action, NC Distributor has asserted six claims against Neusoft China. NC Distributor has also asserted claims against Neusoft USA (a wholly-owned subsidiary of Neusoft China) and against two Neusoft USA employees (Tom Buse and Keith Mildenerberger) who formerly worked for NC Distributor.

I. Summary of Opinion

A. Appeal by Neusoft China

In 2012, the trial court entered an order (the “2012 order”) staying four of NC Distributor’s six claims against Neusoft China, concluding that the four claims were subject to arbitration based on the arbitration clause in their distribution agreement. The trial court, however, denied Neusoft China’s motion to stay the two other claims, concluding that those two claims were not subject to arbitration.

In 2014, the trial court entered another order (the “2014 order”) denying a renewed motion by Neusoft China to refer to arbitration or, in the alternative, stay the two claims that the court had concluded were nonarbitrable in its 2012 order.

Neusoft China has appealed the 2014 order. We hold that we have jurisdiction over this appeal. On the merits, we hold that the trial court did not err in denying Neusoft China’s renewed motion. Accordingly, we affirm that order.

B. Appeals by Neusoft USA and Messrs. Buse and Mildenerberger

In 2013, Neusoft USA and Messrs. Buse and Mildenerberger moved the trial court to stay NC Distributor’s claims against *them* pending arbitration of NC Distributor’s four arbitrable claims against Neusoft China. In 2014, the trial court denied these motions. Neusoft USA and Messrs. Buse and Mildenerberger appeal from these interlocutory orders. We hold that we have jurisdiction over these appeals; however, on the merits,

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we hold that the trial court did not err in denying the motions to stay. Accordingly, we affirm those orders.

II. Background

A. Facts

In 2003, Neusoft China entered into an agreement (the “2003 Distribution Agreement”) with NC Distributor authorizing NC Distributor to become the exclusive distributor of its equipment in various markets in the United States. The 2003 Distribution Agreement contained a clause whereby the parties agreed to settle disputes arising thereunder through arbitration in China.

In the years that followed, in addition to selling Neusoft China’s equipment in the United States, NC Distributor also developed a profitable business – outside the 2003 Distribution Agreement – contracting with the end users of the equipment to provide warranty repair and service work.

In 2009, Neusoft China entered into negotiations to acquire NC Distributor. During these negotiations, the parties entered into a second agreement (the “2009 Non-disclosure Agreement”) whereby NC Distributor agreed to disclose its confidential information – including information about its warranty business – and whereby Neusoft China agreed to use the confidential information only for the purpose of “evaluating, negotiating and implementing” the potential acquisition. Unlike the 2003 Distribution Agreement, however, this 2009 Non-disclosure Agreement did *not* contain an arbitration clause. Ultimately, the negotiations did not lead to a deal.

In 2010, Neusoft China and NC Distributor amended the 2003 Distribution Agreement to extend its term. However, under the terms of the amendment, NC Distributor was no longer Neusoft China’s *exclusive* distributor in any region.

Shortly thereafter, Neusoft China – through its subsidiary Neusoft USA – began competing directly with NC Distributor in the distribution *and* servicing of the equipment. During this time, Neusoft USA hired away employees of NC Distributor, including Messrs. Buse and Mildenberger.

In September of 2011, representatives of Neusoft USA, including Mr. Buse, met with representatives of NC Distributor. During a break in the meeting, a representative of NC Distributor accessed Mr. Buse’s computer without his authorization and transferred certain information

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from the computer onto a thumb drive, ostensibly to determine whether Neusoft USA was using any of NC Distributor's confidential information.

B. Statement of Proceedings

In November of 2011, Neusoft USA commenced this action against NC Distributor, asserting claims in connection with the access of Mr. Buse's computer.

In December of 2011, NC Distributor answered, asserting counter-claims against Neusoft USA. NC Distributor also brought in Neusoft China, asserting six claims.

In October of 2012, after a hearing, the trial court determined that four of NC Distributor's six claims against Neusoft China arose under the 2003 Distribution Agreement and were, therefore, subject to arbitration. However, the court ruled that two of the claims – NC Distributor's claims for breach of the 2009 Non-disclosure Agreement (which did not have an arbitration clause) and for unfair and deceptive practices in connection with this breach – *did not* "arise in connection with the interpretation or implementation" of the 2003 Distribution Agreement, denying Neusoft China's motion to stay proceedings on those two claims pending arbitration of the other four claims. This 2012 order was not appealed.

In March of 2013, with leave of court, NC Distributor filed an amended pleading, bringing in Mr. Buse and Mr. Mildenerger, and alleging claims against them.

In December of 2013, after engaging in additional discovery, Neusoft China once again moved the trial court to refer NC Distributor's claims for breach of the 2009 Non-disclosure Agreement and for unfair and deceptive practices to arbitration or, in the alternative, stay those claims pending arbitration of the four arbitrable claims. Neusoft USA and Messrs. Buse and Mildenerger also filed motions to stay NC Distributor's claims against *them* pending arbitration of NC Distributor's arbitrable claims against Neusoft China.

In January of 2014, after a hearing on the matter, the trial court entered orders denying all three motions, allowing both the claims for breach of the 2009 Non-disclosure Agreement and for unfair and deceptive practices to proceed. Neusoft China, Neusoft USA, and Messrs. Buse and Mildenerger entered timely notices of appeal.

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III. Analysis

A. Right to Immediate Appeal

Each of the orders being appealed is interlocutory because none are dispositive as to all claims and all parties. *Bullard v. Tall House Bldg. Co., Inc.*, 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) (“An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.”). Generally, there is no right to immediate appeal from an interlocutory order. *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992). However, N.C. Gen. Stat. §§ 1-277 and 7A-27 set forth exceptions to this general rule. *Id.* Applying these statutes, our Supreme Court has held that a right to an immediate appeal from an interlocutory order exists where the order “deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment.” *Id.* at 292, 420 S.E.2d at 428 (internal marks omitted).

Our Supreme Court has developed a “two-part test,” *see id.*, to determine whether an interlocutory order is immediately appealable where an appellant claims to have been deprived of a substantial right: (1) “the right itself must be substantial”; and, (2) “the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment.” *Frost v. Mazda Motors of America, Inc.*, 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000) (internal marks omitted). However, as the Supreme Court has recognized, “the ‘substantial right’ test is more easily stated than applied[,]” and appellate courts “must consider the particular facts of each case and the procedural history of the order from which an appeal is sought.” *Travco Hotels*, 332 N.C. at 292, 420 S.E.2d at 428. Therefore, to determine whether we have jurisdiction over an appeal, we must discern the precise nature of the right the appellant claims as substantial.¹ To that end, each appellant bears the burden of

1. However, we do not reach the *merits* of an appellant’s claim to that substantial right in answering this threshold jurisdictional question. To do so would, in the words of the United States Supreme Court, “conflat[e] the jurisdictional question with the merits of the appeal.” *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628, 129 S. Ct. 1896, 1900 (2009). For example, if a defendant claims sovereign immunity as a defense to an action, a denial of its motion to dismiss based on this defense would generally be immediately appealable. *See, e.g., Dep’t of Transp. v. Blue*, 147 N.C. App. 596, 600, 556 S.E.2d 609, 615 (2001). This is true even where there is no *merit* to the defense because, e.g., the defendant belongs to an unrecognized Indian tribe. *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385-86, 677 S.E.2d 203, 207-08 (2009). Nevertheless, an appellant who makes a *frivolous* assertion of a substantial right for an improper purpose (e.g., delay) does so at the risk of being sanctioned by this Court. *See* N.C. R. App. P. 34.

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demonstrating that the interlocutory order appealed from “deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

We address the propriety of Neusoft China’s appeal separately from the appeals taken by Neusoft USA and by Mr. Muse and Mr. Mildenberger.

1. Neusoft China

[1] In its brief, Neusoft China states that it is appealing the 2014 order denying its right to arbitrate. We have held that the right to arbitrate is substantial. *See, e.g., Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). We agree that the 2014 order affects this substantial right. Specifically, the effect of the 2014 order is to require Neusoft China to proceed in defending two of NC Distributor’s claims against it in court rather than in arbitration. As we have often noted regarding the need for immediate review in such cases, the right to arbitrate “may be lost if review is delayed[.]” *See, e.g., Edwards v. Taylor*, 182 N.C. App. 722, 724, 643 S.E.2d 51, 53 (2007). Therefore, we hold that Neusoft China has met its burden to demonstrate that we have jurisdiction over its appeal of the 2014 order.² Accordingly, we consider the merits of its appeal in Section III. B.

2. Neusoft USA and Messrs. Buse and Mildenberger

[2] Neusoft USA and Messrs. Buse and Mildenberger appeal from interlocutory orders denying their motions to stay NC Distributor’s claims against them pending arbitration of the claims asserted against Neusoft China. They argue, inter alia, that they have the right to have the issue of whether NC Distributor can recover damages for the loss of its exclusivity under the 2010 amendment to the Distribution Agreement decided by arbitration. These appellants essentially argue that they have the right to have this issue decided by arbitration even though they are not parties to the 2003 Distribution Agreement.

Generally, we do not recognize a right to immediate appeal from an interlocutory order denying a stay of litigation. *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201-02, 476 S.E.2d 440, 442-43 (1996).

2. NC Distributor contends that we lack jurisdiction over Neusoft China’s appeal because it is from a denial of a motion for reconsideration, citing this Court’s decision in *Slaughter v. Swicegood*, 162 N.C. App. 457, 591 S.E.2d 577 (2004). However, assuming *arguendo* that the 2014 order is one denying a motion to reconsider, the effect of the 2014 order nonetheless requires Neusoft China to defend the claims in court.

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Moreover, the right to immediate appeal from an interlocutory order denying arbitration or denying a stay pending arbitration is predicated on the deprivation of the right to arbitrate, which inheres in the contract providing for arbitration. *See Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 381-82, 614 S.E.2d 418, 422 (2005). Nevertheless, we recognize that by operation of common law agency and contract principles, a contractual right to arbitrate may become enforceable by or against a non-signatory to the agreement. *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 229, 721 S.E.2d 256, 261-62 (2012). Since the right to arbitrate a claim *or issue* is a substantial right if it is enforceable by or against an appellant who is a non-signatory to the agreement creating it, we hold that we have jurisdiction to review the merits of Neusoft USA and Messrs. Buse and Mildenerger's appeals.³

B. Merits of the Appeals

1. Neusoft China

[3] Having determined that the 2014 order denying Neusoft China's renewed motion is immediately appealable, we now consider the merits of the appeal. For the reasons stated below, we hold that the trial court did not err in denying Neusoft China's renewed motion; and, therefore, we affirm the trial court's 2014 order.

Our Supreme Court has held that one trial court judge has the authority to reconsider an interlocutory order entered by another trial court judge “*only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter.*” *State v. Duvall*, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981) (emphasis added). As our Supreme Court observed, “if the rule were otherwise, the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge.” *Id.* at 562, 284 S.E.2d at 498.

In the present case, the trial court concluded in its 2014 order that there had “been no substantial change in circumstances [] which would

3. We note that Neusoft China, Neusoft USA, and Messrs. Buse and Mildenerger all cite § 16 of the Federal Arbitration Act (“FAA”), *see* 9 U.S.C. 16(a)(1)(A) (2013), as an additional basis for our jurisdiction. However, § 16 of the FAA applies *in federal court*. *See Volt Info. Sci., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 n. 6, 109 S. Ct. 1248, 1254 n. 6 (1989). State law governs the appealability of interlocutory orders in State court. *Elliott v. KB Home North Carolina, Inc.*, ___ N.C. App. ___, ___, 752 S.E.2d 694, 697 (2013).

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warrant a different or new disposition[.]” Neusoft China argues, however, that a substantial change warranting the modification of the trial court’s 2012 order did occur. Specifically, Neusoft China contends as follows: Initially, NC Distributor merely asserted that the two claims were based on a theory that Neusoft China had shared NC Distributor’s confidential information with its subsidiary, Neusoft USA. Accordingly, the trial court determined that they were not arbitrable since they did not relate to the 2003 Distribution Agreement. However, after the 2012 order was entered and the time to appeal that order had passed, a representative of NC Distributor stated in a deposition that these claims were based on Neusoft China’s improper use of the confidential information as leverage *during the 2010 renegotiation of the Distribution Agreement*. According to Neusoft China, this purported change in theory is a “substantial change” because it amounts to an admission by NC Distributor that the two claims based on the Non-disclosure Agreement and found by the trial court to be nonarbitrable in its 2012 order do, in fact, relate to the Distribution Agreement and are, therefore, subject to the arbitration clause contained in that agreement.

Generally, we review a trial court’s decision to grant or deny a stay of nonarbitrable claims in a dispute pending arbitration of the arbitrable claims for an abuse of discretion. *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 485, 583 S.E.2d 325, 334 (2003). However, the determination of whether a claim or issue in a dispute *is* arbitrable is a question of law we review *de novo*. See, e.g., *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). Therefore, we review *de novo* whether the trial court correctly concluded that Neusoft China had failed to show that a substantial change in circumstances had occurred.

NC Distributor’s complaint against Neusoft China alleges that Neusoft China used confidential information, including but not limited to “customer data, financial data, and projected revenue data” that were shared for the sole purpose of “evaluating, negotiating, and implementing” the acquisition, “to formulate a plan to drive [NC Distributor] out of business for [Neusoft China’s] own benefit,” and by disclosing said information to Neusoft USA. NC Distributor’s complaint also alleges that Neusoft China used the confidential information acquired in connection with the potential acquisition “to establish [Neusoft USA]” and “to formulate a plan of forcing [NC Distributor] out of business and to otherwise steal [NC Distributor’s] employees and customers,” further alleging that it used said information to outbid NC Distributor, offering the same products to NC Distributor’s customers below cost, and that this “conduct constitute[d] unfair methods of competition and unfair or

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deceptive acts or practices[.]” Thus, the allegations in NC Distributor’s complaint put Neusoft China on notice that it was seeking damages for use of confidential information obtained pursuant to the Non-disclosure Agreement to compete unfairly with it rather than for the sole purpose of evaluating and negotiating a potential acquisition, and that this use of the information not only constituted breach of the agreement, but also independently qualified as an unfair and deceptive practice under North Carolina law.

Neusoft China traces the origins of the alleged change in NC Distributor’s theory of the case to the deposition testimony of NC Distributor’s CEO, Kim Russell. Specifically, Mr. Russell testified that Neusoft China used NC Distributor’s confidential information provided pursuant to the Non-disclosure Agreement *as leverage* in negotiations over amending the Distribution Agreement, specifically using the word “threat” during his testimony. However, the “threat” to which the deponent referred did not introduce some new theory of liability. Rather, the context plainly demonstrates that the deponent’s testimony was that Neusoft China used the confidential information to compete with NC Distributor rather than for purposes of evaluating and negotiating the potential acquisition. The deponent was merely stating one way Neusoft China used the information competitively, namely as leverage in negotiations over the 2010 amendment to the Distribution Agreement. Therefore, we hold that the trial court did not err in denying Neusoft China’s renewed motion to refer the claims continuing in litigation to arbitration or, in the alternative, to stay those claims pending arbitration.

[4] Neusoft China also argues that the trial court erred in failing to conclude that NC Distributor was *equitably estopped* from denying the applicability of the arbitration clause in the Distribution Agreement to the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices. Specifically, Neusoft China contends that NC Distributor is using the Distribution Agreement as a reference point in calculating its damages. We do not believe the trial court committed reversible error in this regard.

Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment. There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply.

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Gore v. Myrtle/Mueller, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (internal marks and citation omitted). In the context of arbitration, “the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” *Ellen v. A.C. Schultes of Maryland, Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (internal marks omitted). However, in *Ellen* we refused to extend the application of the doctrine where the plaintiffs were not “seeking any direct benefits from the contracts containing the relevant arbitration clause,” or “asserting any rights arising under [those] . . . contracts.” *Id.* at 322, 615 S.E.2d at 733.

In the present case, NC Distributor is not simultaneously denying the enforceability of the arbitration clause in the Distribution Agreement with Neusoft China while also claiming a right under the Distribution Agreement. That is, just as in *Ellen*, the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices do not necessarily “depend upon the [Distribution Agreement] containing the arbitration clause.” *Id.* at 322, 615 S.E.2d at 733. Rather, these claims depend on legal duties imposed by an agreement which does *not* contain an arbitration clause and by North Carolina law prohibiting unfair and deceptive practices. As in *Ellen*, in prosecuting these claims NC Distributor is not “seeking any direct benefits from the contract[] containing the relevant arbitration clause,” or “asserting any rights arising under [that] . . . contract[.]” *Id.* at 322, 615 S.E.2d at 733. Accordingly, we hold that the trial court did not err in failing to conclude that equitable estoppel applies to NC Distributor’s claims.⁴

2. Merits of Neusoft USA’s Appeal and Messrs. Buse and Mildenberger’s Appeal

[5] We have reviewed the arguments of Neusoft USA and Messrs. Buse and Mildenberger, and we conclude that the trial court did not err in denying their motions to stay NC Distributor’s claims against them pending arbitration of the four arbitrable claims asserted against Neusoft China.

On appeal, Neusoft USA and Messrs. Buse and Mildenberger claim that NC Distributor is seeking damages from them, in part, because of lost profits *due to* the loss of its exclusivity under the 2003 Distribution

4. Neusoft China also argues that the trial court erred in finding that it had waived the right to arbitrate the two remaining claims. We need not reach this argument, as we have concluded that the trial court did not err in concluding that Neusoft China otherwise has no right to compel arbitration of these claims.

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Agreement; and, therefore, they argue that they are entitled to a stay until this issue is resolved by arbitration.⁵ Specifically, they contend that a portion of the damages that NC Distributor seeks is dependent upon the invalidity of the 2010 amendment to the 2003 Distribution Agreement, which stripped NC Distributor of its status as Neusoft China's exclusive distributor. However, NC Distributor has made no such claim against these Defendants in its pleadings for damages. Rather, NC Distributor only seeks lost profits *due* to the appropriation by Neusoft USA and Messrs. Buse and Mildenberger of NC Distributor's confidential information, irrespective of any loss of any status under the 2003 Distribution Agreement.⁶

These Defendants contend that the validity of the 2010 amendment predominates the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices, that the validity of the 2010 amendment can only be determined in arbitration, and that a determination of the validity of the amendment would preclude NC Distributor's success on those claims. However, the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices present distinct legal issues from those presented by the arbitrable claims, namely whether Defendants or any of them impermissibly used NC Distributor's confidential information to compete with NC Distributor rather than for the permissible purposes of evaluating and negotiating a potential acquisition and whether such use constituted an unfair and deceptive practice under North Carolina law.

IV. Conclusion

We hold that the trial court did not err in denying the motion to refer the claims against Neusoft China for breach of the Non-disclosure

5. Messrs. Buse and Mildenberger also contend that the trial court's order denying their motion to stay the proceedings pending arbitration was erroneous in its omission of an express ruling on the applicability of the FAA. However, while a panel of this Court has held that a trial court's denial of a motion to compel arbitration must contain a finding as to the applicability of the FAA, *see Sillins v. Ness*, 164 N.C. App. 755, 759, 596 S.E.2d 874, 877 (2004), no such requirement exists for an order granting or denying a motion for a stay, and we decline to impose one.

6. Neusoft China, Neusoft USA, and Messrs. Buse and Mildenberger also argue at length regarding the eventual calculation of damages. However, "[t]he assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury, subject, of course, to the discretionary power of the judge to set its verdict aside, when in his opinion equity and justice so require." *Matthews v. Lineberry*, 35 N.C. App. 527, 528, 241 S.E.2d 735, 737 (1978). Moreover, we do not issue advisory opinions. *See, e.g., Lemon v. Combs*, 164 N.C. App. 615, 625-26, 596 S.E.2d 344, 350 (2004).

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Agreement and for unfair and deceptive practices to arbitration or, in the alternative, to stay those claims. Further, we hold that the trial court did not err in denying the other Defendants' motions to stay the claims against them pending the arbitration of four arbitrable claims against Neusoft China. Accordingly, we affirm the orders of the trial court.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

CATHY SUGGS PATTERSON, PLAINTIFF
v.
TIMOTHY CRAIG PATTERSON, DEFENDANT

No. COA14-830

Filed 7 July 2015

**Divorce—alimony—purely contractual agreement—cohabitation
—enforcement**

In an action for specific performance of defendant's alimony obligations, the trial court did not err by denying defendant's motion for summary judgment. Plaintiff's cohabitation was not a bar to enforcement of the alimony agreement because N.C.G.S. § 50-16.9, which names cohabitation and death as events that terminate court-ordered alimony, does not apply to alimony agreements that are purely contractual.

Appeal by defendant from order entered 15 July 2014 by Judge Jacquelyn L. Lee in Harnett County District Court. Heard in the Court of Appeals 5 January 2015.

Ryan McKaig for plaintiff-appellee.

Doster, Post, Silverman, Foushee, Post & Patton, P.A., by Jonathan Silverman, for defendant-appellant.

McCULLOUGH, Judge.

Timothy Craig Patterson ("defendant") appeals the denial of his motion for summary judgment. For the following reasons, we affirm.

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I. Background

Cathy Suggs Patterson (“plaintiff”) and defendant married on 25 April 1974, separated in December 2001, and later divorced. Coinciding with their separation, plaintiff and defendant made and entered into a separation and property settlement agreement (the “agreement”) on 7 December 2001. The agreement provided as follows concerning alimony:

[Defendant] shall pay to [plaintiff] a monthly sum of alimony in the amount of \$2,000.00. This payment shall begin on the 1st day of January 2002 and continue on the same day of each month thereafter until the occurrence of one of the following events:

1. [Defendant’s] death[;]
2. [Plaintiff’s] remarriage [; or]
3. [Plaintiff’s] death[.]

This obligation shall terminate in the event one or more of the above referenced events occurs.

Pursuant to its terms, the agreement was never incorporated into a court order or judgment during plaintiff’s and defendant’s divorce.

On 16 July 2013, plaintiff commenced this action by filing a verified complaint seeking specific performance of defendant’s alimony obligations pursuant to the terms of the agreement. Plaintiff alleged defendant “paid all alimony payments until May 2013[,]” but has since “refused to make further payments as provided in the [agreement] . . . without justification or excuse.” Defendant responded to the complaint by filing an answer and a separate motion for summary judgment on 2 October 2013. In both his answer and motion for summary judgment, defendant pled plaintiff’s cohabitation as a bar to the enforcement of the alimony provision of the agreement and argued the agreement was void as against public policy. Plaintiff filed replies to defendant’s motion for summary judgment and defendant’s answer on 20 November 2013.

Based on the various pleadings, affidavits submitted in support of the pleadings, and plaintiff’s deposition taken 26 September 2013, it is undisputed that prior to plaintiff filing this action, plaintiff was cohabitating and defendant ceased making alimony payments in accordance with the agreement.

Following a hearing on defendant’s motion for summary judgment in Harnett County District Court, the trial judge entered an order on

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22 April 2014 in which she denied defendant's motion and attempted to certify the matter for appeal. Defendant filed notice of appeal from the order on 21 May 2014.

On 15 July 2014, the trial judge entered an amended summary judgment order by consent of the parties in which she clarified the certification of the matter for appeal; the amended order, however, was identical to the first in that it denied defendant's motion for summary judgment based in large part on the following determinations:

11. The [agreement] entered into by and between the parties to this action is not, by its own terms, violating public policy, promoting any action to violate public policy, or otherwise void.

12. When the totality of the terms of the parties' [agreement] are read, as a whole, the [a]greement fails to violate public policy and pursuant to North Carolina Case Law, continues to remain valid and in full force and effect.

Defendant filed notice of appeal from the amended order on 15 July 2014.

II. Discussion

The sole issue on appeal is whether the trial court erred in denying defendant's motion for summary judgment. Defendant contends the trial court did err because the alimony provision in the agreement, which does not provide for termination of alimony payments upon plaintiff's cohabitation, is void as against public policy. Therefore, defendant asks this Court to declare the alimony provision void, reverse the trial court's decision, and direct entry of summary judgment in his favor.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). In this case, the material facts are undisputed and this Court's review is limited to whether the trial court erred as a matter of law.

On appeal, defendant recognizes that the freedom of contract is a fundamental constitutional right, but contends the right is limited by public policy considerations. Illustrative of defendant's contention and pertinent to this case, N.C. Gen. Stat. § 52-10.1 provides that "[a]ny married couple is . . . authorized to execute a separation agreement

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not inconsistent with public policy” N.C. Gen. Stat. § 52-10.1 (2013). Defendant then asserts the public policy of North Carolina regarding alimony and cohabitation is reflected in N.C. Gen. Stat. § 50-16.9, which governs modification of contested and uncontested court orders for alimony or postseparation support. As defendant points out, prior to 1995, N.C. Gen. Stat. § 50-16.9 provided, “[i]f a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate.” N.C. Gen. Stat. § 50-16.9 (1993). However, N.C. Gen. Stat. § 50-16.9 was amended in 1995 to refer to postseparation support in addition to alimony and to include cohabitation and death as events terminating court ordered alimony or postseparation support. *See* 1995 N.C. Sess. Laws ch. 319, § 7. Thus, N.C. Gen. Stat. § 50-16.9 now provides as follows:

If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate. Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.

N.C. Gen. Stat. § 50-16.9(b) (2013).

Defendant claims the legislature’s amendment to N.C. Gen. Stat. § 50-16.9 in 1995 reflects this Court’s opinion in *Sethness v. Sethness*, 62 N.C. App. 676, 303 S.E.2d 424 (1983), in which this Court looked unfavorably upon cohabitation but upheld the trial court’s dismissal of a suit seeking to terminate contractual postseparation support, noting that just “[b]ecause a separation agreement does not specifically prohibit . . . cohabitation and may, by implication condone [it], it does not therefore follow that the agreement promotes [it].” 62 N.C. App. at 681, 202 S.E.2d at 428. This Court then stated, “[w]hether the silence of a separation agreement on [cohabitation] renders it void as against public policy is a matter for legislative, not judicial determination.” 62 N.C. App. at 681, 202 S.E.2d at 428.

Defendant contends the policy behind the amendment to include cohabitation as a terminating event for court ordered alimony or postseparation support in N.C. Gen. Stat. § 50-16.9 applies equally to contractual alimony or postseparation support.

Upon review of the N.C. Gen. Stat. § 50-16.9, *Sethness*, and the other cases cited by defendant, we disagree with defendant’s view that N.C. Gen. Stat. § 50-16.9 reflects a broad public policy in North Carolina that

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all alimony or postseparation support, whether court ordered or contractual, shall terminate upon cohabitation of the dependent spouse. In line with many cases decided by this Court, we find the distinction between court ordered and contractual support obligations significant and hold N.C. Gen. Stat. § 50-16.9 only reflects the public policy regarding court ordered alimony or postseparation support. *See Acosta v. Clark*, 70 N.C. App. 111, 115, 318 S.E.2d 551, 554 (1984) (citing *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (discussing the difference between a separation agreement treated as a contract and a separation agreement that has been approved by the court as part of a court ordered judgment)); *see also Williamson v. Williamson*, 142 N.C. App. 702, 704, 543 S.E.2d 897, 898 (2001) (emphasizing N.C. Gen. Stat. § 50-16.9 refers to spousal support payments pursuant to a judgment or order). “[I]f the parties wish to preserve their agreement as a contract they need only avoid submitting their agreement to the court.” *Acosta*, 70 N.C. App. at 115, 318 S.E.2d at 554 (citing *Walters*, 307 N.C. at 386, 298 S.E.2d at 342). N.C. Gen. Stat. § 50-16.9 does not, and was not intended to, interfere with the freedom of the parties to agree to terms for alimony that is purely contractual. If the legislature intended to address this court’s decision in *Sethness* and espouse a broad public policy covering contractual alimony or postseparation support, it would not have used language limiting N.C. Gen. Stat. § 50-16.9 to situations where “a dependent spouse . . . is receiving postseparation support or alimony from a supporting spouse *under a judgment or order of a court of this State*[.]” N.C. Gen. Stat. § 50-16.9(b).

Moreover, as this Court pointed out in *Sethness*, “the clear implication of [cases where separation agreements were found to be void as against public policy] and [N.C. Gen. Stat. § 52-10.1] . . . is that such agreements may not by their own terms promote objectives (i.e.: divorce, termination of parental rights) which are offensive to public policy.” 62 N.C. App. at 680, 303 S.E.2d at 427; *see also Williams v. Williams*, 120 N.C. App. 707, 463 S.E.2d 815 (1995) (noting a provision in an agreement that comprises a promise looking towards future separation is void as against public policy because it would discourage the plaintiff from putting forth a concerted effort to maintain the marriage). In *Sethness*, this Court relied on *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E.2d 809 (1977), which is very similar to the present case. As we explained in *Sethness*,

Riddle holds, in accordance with general principles of contract law, that a separation agreement must be enforced according to its own terms. The applicable provision of this separation agreement, quoted at the outset, provides that [the] plaintiff is to pay [the] defendant certain sums

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of money. This obligation is to continue until the happening of certain events stated in the agreement (i.e.: emancipation of the child, remarriage of [the] defendant). The agreement also confirms the right of the parties to “live separate and apart” and provides that “neither party shall interfere with the rights, privileges, doings or actions of the other.” Under the agreement, cohabitation by [the] defendant with another man does not constitute a breach of the agreement or grounds for termination of [the] plaintiff’s support obligation.

62 N.C. App. at 681, 303 S.E.2d at 427-28. Thus, “cohabitation by one party to a separation agreement does not necessarily invalidate the agreement or relieve a party of his support obligations thereunder.” *Id.* at 681, 303 S.E.2d at 427.

Defendant’s only argument against reliance on *Sethness* and *Riddle* is that those cases were decided prior to the amendments to N.C. Gen. Stat. § 50-16.9. Yet, in *Jones v. Jones*, 144 N.C. App. 595, 548 S.E.2d 565 (2001), decided after the amendment to N.C. Gen. Stat. § 50-16.9, the Court continued to emphasize that contractual alimony in a separation agreement was not affected by the plaintiff’s cohabitation. 144 N.C. App. at 601, 548 S.E.2d at 568. “[T]he separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles.” *Id.* at 601, 548 S.E.2d at 569. Whether or not the discussion of contractual alimony in *Jones* is dicta, we find that the distinction between contractual and court ordered support is still significant and, as discussed, hold N.C. Gen. Stat. § 50-16.9 reflects only the policy with regard to court ordered support. Thus, the result in this case is no different than in *Sethness* and *Riddle*.

In this case, where the parties included specific events in the agreement to terminate alimony, agreed that the parties were to live separate and apart as if they were single and unmarried, and agreed the agreement would not become part of a divorce judgment, we hold defendant is bound by the terms of the agreement.

III. Conclusion

For the reasons discussed, we hold trial court did not err in denying defendant’s motion for summary judgment and affirm the order of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

SALZER v. KING KONG ZOO

[242 N.C. App. 120 (2015)]

CHARLENE SALZER, MARY ELDER, AND MARTHA BUFFINGTON, PLAINTIFFS

v.

KING KONG ZOO, AND JOHN CURTIS, DEFENDANTS

No. COA14-1211

Filed: 7 July 2015

1. Constitutional Law—federal preemption—animal welfare—complementary state legislation

The federal Animal Welfare Act (AWA) did not expressly preempt plaintiff's claim from being brought in a North Carolina District Court because the language of the AWA permits the enactment of complementary legislation by the states.

2. Constitutional Law—federal preemption—animal welfare—no implicit intent to occupy entire field

Congress could not have implicitly intended to occupy an entire field of regulation when it explicitly afforded states the right to enact cooperative legislation in the same field.

3. Constitutional Law—federal preemption—animal welfare—state and federal legislation—not in conflict

The federal Animal Welfare Act (AWA) did not preempt plaintiffs' claim under N.C.G.S. § 19A where the two statutes applied equally and did not conflict so much as operate cooperatively.

Appeal by Plaintiffs from an order entered 29 August 2014 by Judge Donna Forga in Cherokee County District Court. Heard in the Court of Appeals 20 April 2015.

Winston & Strawn LLP, by Amanda L. Groves and Elizabeth J. Ireland, for Plaintiff-Appellants.

No brief submitted by Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Charlene Salzer, Mary Elder, and Martha Buffington ("Plaintiffs") appeal from an order granting dismissal of their complaint for lack of subject matter jurisdiction. For the following reasons, we reverse and remand the decision of the district court.

SALZER v. KING KONG ZOO

[242 N.C. App. 120 (2015)]

I. Factual & Procedural History

In 1991, the current and former owners of King Kong Zoo incorporated the King Kong Zoological Park, Inc. in North Carolina, with Defendant John Curtis as its registered agent. King Kong Zoological Park, Inc. privately owns and operates King Kong Zoo. King Kong Zoo is an Animal Welfare Act (“AWA”) licensed exhibitor of wild and domestic animals in Murphy, North Carolina.

On 30 April 2014, Plaintiffs Charlene Salzer, Mary Elder, and Martha Buffington initiated a civil action against King Kong Zoo and John Curtis (“Defendants”) in Cherokee County District Court, alleging facts amounting to animal cruelty in violation of N.C. Gen. Stat. § 19A-1. According to Plaintiffs, the conditions in which King Kong Zoo kept the animals were grossly substandard. Plaintiffs moved the Cherokee County District Court for a permanent injunction against King Kong Zoo’s exhibition of domestic and exotic wildlife, as well as an order terminating John Curtis’s ownership and possessory rights in the animals exhibited. Defendants subsequently moved for dismissal of Plaintiffs’ complaint for lack of personal jurisdiction over King Kong Zoological Park, Inc. pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, and for lack of jurisdiction over the subject matter of the complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

The case came on for hearing on 18 August 2014. Defendants first argued insufficient service of process because Plaintiffs named an improper party—“King Kong Zoo”—instead of “King Kong Zoological Park, Inc.” in their service of summons. Defendants next argued that, because the federal AWA governs exhibitors and the welfare of animals in licensed zoos, the United States District Court is vested jurisdiction in the subject matter, and such federal law preempts Plaintiffs from seeking relief under N.C. Gen. Stat. § 19A-1. In response, Plaintiffs contended N.C. Gen. Stat. § 19A-1 is not preempted, but rather works in conjunction with the federal AWA.

On 29 August 2014, the district court issued a written order denying Defendants’ motion for dismissal on the grounds of personal jurisdiction. However, the court granted Defendants’ motion to dismiss for lack of subject matter jurisdiction. The court stated the applicable law in this case is the federal AWA, contained in Chapter 54 of Title 7 of the United States Code because “N.C. Gen. Stat. § 19A-1 . . . has no application to licensed zoo operations.” Therefore, the court found, jurisdiction lies not in the State court but in the United States District Court. Plaintiffs filed timely written notice of appeal to this Court on 17 September 2014.

SALZER v. KING KONG ZOO

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II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2), which provides for an appeal of right to the Court of Appeals from any final judgment of a district court in a civil action. *See* N.C. Gen. Stat. § 7A-27(b)(2) (2014).

III. Standard of Review

The standard of review “of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*.” *M Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 257 (2012) (citation and quotation marks omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].” *Id.*

IV. Analysis

This is a case of first impression in North Carolina—addressing whether the federal AWA preempts Plaintiffs from bringing their claim in Cherokee County District Court under N.C. Gen. Stat. § 19A. Pursuant to the Tenth Amendment of the United States Constitution, “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. Federal law, therefore, preempts state law only when: “(1) Congress explicitly provides for the preemption of state law; (2) Congress implicitly indicates the intent to occupy an entire field of regulation to the exclusion of state law; or (3) the relevant state law principle actually conflicts with federal law.” *Eastern Carolina Reg’l Hous. Auth. v. Lofton*, __ N.C. App. __, __, 767 S.E.2d 63, 69 (2014) (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992)). Courts typically begin their analysis of federal preemption “with a presumption against federal preemption.” *Davidson Cnty. Broad., Inc. v. Rowan Cnty. Bd. of Comm’rs*, 186 N.C. App. 81, 89, 649 S.E.2d 904, 910 (2007) (quotation marks and citation omitted). Moreover, “[w]here . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Id.*

Therefore, here, the issue is whether the federal AWA (A) expressly preempts any State regulation of animal welfare; (B) implies an intent to regulate the welfare of all animals in the United States; or (C) conflicts with N.C. Gen. Stat. § 19A so that “compliance with both state and federal requirements is impossible, or where state law stands as an obstacle

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to the . . . objectives of Congress.” *Lofton*, __ N.C. App. at __, 767 S.E.2d at 69. For the following reasons, we hold the federal AWA does not preempt State regulation of animal welfare under N.C. Gen. Stat. § 19A.

A. Express Preemption of State Regulations Regarding Animal Welfare

[1] Under the “Express Preemption” theory, federal law preempts state law if the federal law contains “explicit pre-emptive language.” *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 44, 681 S.E.2d 465, 476 (2009) (citing *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 115, 112 S. Ct. 2374, 2392 (1992)). In *Guyton*, this Court considered whether the federal National Flood Insurance Act (“NFIA”) preempted the plaintiffs from seeking redress in State court. We held “[a]s a result of the absence of expressly preemptive language in the NFIA . . . the NFIA [did] not expressly preempt . . . civil actions against lenders[.]” *Id.* at 45, 681 S.E.2d at 477. Here, Paragraph 1 of the federal AWA provides, “The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.” 7 U.S.C. § 2143(a)(1) (2006). Additionally, instead of providing definite language preempting state regulation of animal welfare, the AWA explicitly states, “Paragraph (1) shall not prohibit any State . . . from promulgating standards in addition to those standards promulgated by the Secretary under paragraph (1).” 7 U.S.C. § 2143(a) (8) (2006). This precise language permitting states to enact complementary legislation to the AWA indicates the federal law does not expressly preempt claims under N.C. Gen. Stat. § 19A. Thus, under the “Express Preemption” theory, Plaintiffs are not limited to relief in federal courts. Moreover, other jurisdictions have held animal welfare to be “recognized as part of the historic police power of the States.” *DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) (citing *Nicchia v. New York*, 254 U.S. 228, 230-31, 41 S. Ct. 103, 103-04 (1920)).

Therefore, the federal AWA does not preempt N.C. Gen. Stat. § 19A, but empowers Section 19A to work in conjunction with the AWA. Accordingly, due to explicit language empowering states to enact animal welfare laws complementary to the AWA, Plaintiffs’ claim is not expressly preempted from being brought in Cherokee County District Court.

B. Implied Intent to Regulate All Animal Welfare in the United States

[2] As noted above, Congress empowered the individual states to enact harmonious legislation to work in conjunction with the AWA. Congress, therefore, could not have implicitly intended to occupy an entire field

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of regulation if it explicitly affords states the right to enact cooperative legislation dealing with the same field.

C. Conflict Between N.C. Gen. Stat. § 19A and the Federal Animal Welfare Act

[3] Under the “Conflict Preemption” theory, federal law preempts state regulation when “compliance with both state and federal requirements is impossible, or ‘where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990)). The issue of “Conflict Preemption” arises “when ‘compliance with both federal and state regulations is a physical impossibility[.]’” *State ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 1722 (1983)).

There is no conflict of law here preempting Plaintiffs from bringing their action in Cherokee County. Both N.C. Gen. Stat. § 19A and the AWA apply to King Kong Zoo and both protect against the inhumane treatment of animals such as those exhibited in King Kong Zoo. N.C. Gen. Stat. § 19A is applicable to privately owned zoos such as King Kong Zoo because King Kong Zoo is not a “bona fide zoo[] . . . operated by federal, State, or local government agencies.” N.C. Gen. Stat. § 19A-11 (listing exceptions to the statute). Similarly, the federal AWA applies to King Kong Zoo because it is a licensed private exhibitor under the AWA. N.C. Gen. Stat. § 19A prohibits the same inhumane treatment of animals as the federal AWA. Thus, they apply equally and do not conflict so much as they operate cooperatively.

Because no explicit preemptive language exists, no implicit intent by Congress to occupy the entire field of animal welfare regulation exists, and the federal and State statutes do not conflict, we hold the federal AWA does not preempt Plaintiffs’ claim under N.C. Gen. Stat. § 19A. Therefore, the trial court erred in finding it lacked subject matter jurisdiction over Plaintiffs’ complaint.

For the reasons above, we reverse and remand to the Cherokee County District Court for determination consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

STATE v. CALDERON

[242 N.C. App. 125 (2015)]

STATE OF NORTH CAROLINA

v.

JESUS CALDERON, DEFENDANT

STATE OF NORTH CAROLINA

v.

CHRISTOPHER LASHON MILLER, JR., DEFENDANT

No. COA14-1131

Filed 7 July 2015

1. Robbery—jury instructions—not-guilty mandate

In defendants’ trial for offenses stemming from an armed robbery, it was not plain error when the trial court failed to deliver the “not guilty” mandate during its jury instructions on robbery with a firearm and common law robbery. This error did not amount to plain error because the trial court did not impermissibly suggest that defendants must be guilty, and the verdict sheets clearly informed the jury of its option of returning a “not guilty” verdict.

2. Robbery—attempt—sleeping victim—acting in concert

In defendants’ trial for offenses stemming from an armed robbery, the trial court did not err by denying defendants’ motion to dismiss the charges of attempted robbery with a firearm as to one of the victims. The evidence showed that defendants brandished their weapons in the apartment and their co-perpetrator, with a shotgun in hand, approached the sleeping victim to take money from his pockets.

3. Robbery—attempt—jury instruction—acting in concert—omitted

In defendants’ trial for offenses stemming from an armed robbery, it was not prejudicial error for the trial court to omit instructions on acting in concert from the attempted robbery jury instructions. Considering the evidence presented at trial and the jury instructions in their entirety, the Court of Appeals was not convinced that the instructions were likely to mislead the jury.

4. Robbery—armed—jury instructions—lesser-included offenses

In defendants’ trial for offenses stemming from an armed robbery, it was not error for the trial court not to instruct the jury on lesser-included offenses for one of the charges of armed robbery.

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An instruction on lesser-included offenses is required only when the evidence would allow the jury to find the defendant guilty of the lesser offense and acquit him of the greater.

Appeal by Defendants from judgments entered 21 April 2014 by Judge Jeffrey P. Hunt in Superior Court, Cleveland County. Heard in the Court of Appeals 6 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant and Assistant Attorney General Rebecca E. Lem, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant–Appellant Calderon.

Leslie C. Rawls for Defendant–Appellant Miller.

McGEE, Chief Judge.

Jesus Calderon (“Defendant Calderon”) and Christopher Lashon Miller, Jr. (“Defendant Miller”) (collectively “Defendants”) appeal from judgments entered upon jury verdicts finding Defendants each guilty of four counts of robbery with a firearm and two counts of attempted robbery with a firearm, and finding Defendant Calderon guilty of one count of possession of a firearm by a felon. We find no prejudicial error.

I. Facts and Procedural History

The evidence at trial tended to show that Christopher Moore (“Mr. Moore”) and Defendants were “chilling, smoking [marijuana], and drinking” at an apartment complex in Shelby, North Carolina, on 5 June 2013. They ran out of marijuana and decided to walk to the neighboring Ramblewood Apartments complex (“Ramblewood”) “to go rob somebody for some weed.” Defendant Calderon, armed with a twenty-two-caliber pistol, and Defendant Miller, armed with a nine-millimeter pistol, walked with Mr. Moore to Bobbie Yates’s apartment (“the apartment”) in Ramblewood to steal marijuana, since Mr. Moore said he had previously purchased marijuana from Bobbie Yates and believed there would be marijuana in the apartment. When Defendants and Mr. Moore approached Ramblewood, they encountered Bobby Hamrick (“Mr. Hamrick”), who was standing outside the apartment and who told them: “They’re having a card game. There ain’t no weed up there.” When Defendants and Mr. Moore learned from Mr. Hamrick that there was an ongoing card game with “such a [sic] amount of money” on the table, they left Ramblewood

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and returned to the apartment complex, where they retrieved a shotgun for Mr. Moore. Defendants and Mr. Moore, all now armed, returned to the apartment in Ramblewood.

There were a number of people in the apartment, including Bobbie Yates, Cordell Yates, Mr. Hamrick, Terrance Norris ("Mr. Norris"), Anthony Charles ("Mr. Charles"), Troy Vinson ("Mr. Vinson"), Terris Parker ("Mr. Parker"), and Jackie Allen ("Mr. Allen"), as well as the ten-year-old son of Mr. Charles. Bobbie Yates, Cordell Yates, Mr. Charles, Mr. Hamrick, and Mr. Vinson were seated around the kitchen table playing poker, and each of the men had money on the table. Others, including Mr. Charles's ten-year-old son, were seated on one part of a sectional couch in the adjoining living room, and Mr. Allen, who had been drinking alcohol earlier in the evening, was either "passed out" or asleep on another part of the couch. The apartment had an open floor plan, so there was no wall or barrier separating the kitchen from the living room.

As the card game continued, there was a knock on the front door and when the door was opened, Defendants and Mr. Moore "rushed in," all with weapons in hand. As they pointed their weapons at the people in the apartment, one of them announced: "Where it at? You know what time it is." Several of the people in the apartment testified that they knew or recognized Defendants and Mr. Moore.

Once Defendants and Mr. Moore entered the apartment, Defendants stood with their weapons raised and pointed at the people in the apartment while Mr. Moore grabbed the \$200.00 to \$300.00 off the kitchen table and searched through some of the people's pockets, and Mr. Hamrick's socks, for more money. Mr. Moore held his shotgun in his left hand as he proceeded to take the money off the table and from the people in the apartment and put it in his pocket.

One of the people in the living room testified that, when Mr. Moore approached Mr. Parker, Mr. Parker refused to give Mr. Moore his money, stating: "If you all motherf---ers want my money, you got to go in my pocket and get it yourself because I ain't going to give you my money out of my pocket. You got to go in there and get it yourself." Mr. Moore then pressed the barrel of his shotgun to Mr. Parker's forehead, said, "Motherf---er, I kill you," and reached inside Mr. Parker's pockets and took his money. Mr. Charles, whose attention was on the living room where his son was located throughout the robbery, saw Mr. Moore search through Mr. Allen's pockets as he lay on the couch, either "passed out" or asleep, although no witness saw Mr. Moore take any money from Mr. Allen. The entire robbery lasted between two and four minutes, and

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after the money was collected, Defendants and Mr. Moore told the people not to leave the apartment for ten minutes “or they was [sic] going to kill whoever came the f--- out.” As soon as Defendants and Mr. Moore left the apartment, one of the people in the apartment called the police.

Mr. Moore pleaded guilty to nine counts of armed robbery and agreed to testify at Defendants’ trial. Defendants were each indicted on multiple counts of robbery with a dangerous weapon. Defendant Calderon was also indicted on one count of possession of a firearm by a felon. Defendants were tried jointly. At trial, Defendants moved to dismiss the charges at the close of the State’s evidence and at the close of all of the evidence. Two counts of robbery with a dangerous weapon were dismissed against each Defendant, and two counts were reduced to attempted robbery with a firearm.

Defendant Calderon was found guilty by a jury of four counts of robbery with a firearm, two counts of attempted robbery with a firearm, and one count of possession of a firearm by a felon, and was sentenced to two consecutive terms of 73 months to 100 months’ imprisonment for the robbery and attempted robbery convictions, and to one term of fourteen to twenty-six months’ imprisonment for the possession of a firearm by a felon conviction, to begin upon the expiration of the other sentences.

Defendant Miller was found guilty by a jury of four counts of robbery with a firearm and two counts of attempted robbery with a firearm, and was sentenced to two consecutive terms of sixty-four to eighty-nine months’ imprisonment. Both Defendant Calderon and Defendant Miller appeal.

II. Not Guilty Mandate in Jury Instructions

[1] Defendant Calderon first contends the trial court erred by failing to provide a “not guilty” mandate to the jury when the court gave its instruction on the offense of robbery with a firearm and on the lesser-included offense of common law robbery. Defendant Calderon asserts that, because the trial court’s charge to the jury diverged from the pattern jury instructions and did not expressly instruct the jury on its duty to return a verdict of not guilty if certain conditions were met, he was deprived of his fundamental right to have all permissible verdicts submitted to the jury and thus requires a new trial. We disagree.

“Because [Defendant Calderon] did not object at trial to the omission of the not guilty option from the trial court’s final mandate to the jury, we review the trial court’s actions for plain error.” *See State v. McHone*, 174 N.C. App. 289, 294, 620 S.E.2d 903, 907 (2005), *supersedeas*

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and disc. review denied, 362 N.C. 368, 628 S.E.2d 9 (2006). “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (internal quotation marks omitted).

“Every criminal jury must be instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty.” *State v. Chapman*, 359 N.C. 328, 380, 611 S.E.2d 794, 831 (2005) (internal quotation marks omitted). “Such instruction is generally given during the final mandate after the trial court has instructed the jury as to elements it must find to reach a guilty verdict.” *Id.* “Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error.” *McHone*, 174 N.C. App. at 295, 620 S.E.2d at 907. Nonetheless, it has long been recognized that “the trial court’s charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct.” *Id.* at 294, 620 S.E.2d at 907 (internal quotation marks omitted).

In the present case, the parties agreed that the trial court would charge the jury in accordance with the North Carolina Pattern Jury Instructions. For the offense of robbery with a firearm, Pattern Jury Instruction 217.20 provides as follows:

The defendant has been charged with robbery with a firearm, which is taking and carrying away the personal property of another from his person or in his presence without his consent by endangering or threatening a person’s life with a firearm, the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently.

For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt:

First, that the defendant took property from the person of another or in his presence.

Second, that the defendant carried away the property.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

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Fourth, that the defendant knew he was not entitled to take the property.

Fifth, that at the time of taking the defendant intended to deprive that person of its use permanently.

Sixth, that the defendant had a firearm in his possession at the time he obtained the property (or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct represented it to be).

And Seventh, that the defendant obtained the property by endangering or threatening the life of [that person] [another person] with the firearm.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant had in his possession a firearm and took and carried away property from the person or presence of a person without his voluntary consent by endangering or threatening [his] [another person's] life with the use or threatened use of a firearm, the defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty. *If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

N.C.P.I. — Crim. 217.20 (2003) (emphasis added). For the offense of common law robbery, Pattern Jury Instruction 217.10 provides as follows:

The defendant has been charged with common law robbery, which is taking and carrying away personal property of another from his person or in his presence without his consent by violence or by putting him in fear, and with the intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it.

For you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt:

First, that the defendant took property from the person of another or in his presence.

Second, that the defendant carried away the property.

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Third, that the other person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that at that time, the defendant intended to deprive him of its use permanently.

Fifth, that the defendant knew he was not entitled to take the property.

And Sixth, that the taking was by violence or by putting the person in fear.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant took and carried away property from the person or the presence of a person without his voluntary consent, by violence or by putting that person in fear, the defendant knowing that he was not entitled to take it and intending at that time to deprive the person of its use permanently, it would be your duty to return a verdict of guilty. *If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

N.C.P.I. — Crim. 217.10 (2002) (emphasis added).

In the trial on these matters, the trial court's charge to the jury on the offenses of robbery with a firearm and common law robbery conformed to the pattern jury instructions entirely, with the following exception: the court did not expressly instruct the jury that it was its "duty to return a verdict of not guilty" if it had a reasonable doubt as to one or more of the enumerated elements of robbery with a firearm or common law robbery, respectively. Instead, for the offense of robbery with a firearm, the court ended its charge to the jury with the following instruction: "If you do not so find or have a reasonable doubt as to one or more of these things, *then you will not return a verdict of guilty of robbery with a firearm* as to that defendant." (Emphasis added.) For the offense of common law robbery, the court ended its charge to the jury with the following instruction: "If you do not so find or have a reasonable doubt as to one or more of these things, *then you would not find the defendant guilty of common law robbery.*" (Emphasis added.)

In *State v. McHone*, this Court considered whether the trial court committed plain error by "(1) failing to include the option of not guilty of first-degree murder in its final mandate to the jury; and (2) omitting the not guilty option from the verdict sheet for that offense despite

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including a not guilty option on the verdict sheet for the robbery with a dangerous weapon charge.” *State v. Jenrette*, __ N.C. App. __, __, 763 S.E.2d 404, 412 (2014) (citing *McHone*, 174 N.C. App. at 291, 620 S.E.2d at 906), *appeal dismissed and disc. review denied*, __ N.C. __, __ S.E.2d __ (filed Apr. 9, 2015) (No. 416P14). In *McHone*, this Court concluded that “the trial court failed to instruct the jury on the option of finding [the] defendant not guilty during its final mandate” when it instructed the jury to “*not return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation*” and to “*not return a verdict of guilty of first-degree murder under the felony murder rule*,” rather than instructing the jury that “it would be your duty to return a verdict of not guilty” if the State failed to meet one or more of the elements of first-degree murder under either theory. *McHone*, 174 N.C. App. at 292-93, 296, 620 S.E.2d at 906, 908. We determined this instruction constituted a failure to give “an appropriate not guilty mandate,” *see Jenrette*, __ N.C. App. at __, 763 S.E.2d at 412, because the trial court “neither stated that the jury *could* find defendant not guilty of first degree murder, nor that it was their *duty* to do so should they conclude the State failed in its burden of proof,” *McHone*, 174 N.C. App. at 296, 620 S.E.2d at 908, and further did not, “as an alternative to a ‘not guilty’ mandate, instruct the jury to answer ‘no’ to [that] issue on the verdict sheet should it not find any one or more of the elements of murder missing.” *Id.* at 296, 620 S.E.2d at 908–09. Thus, we concluded that “the trial court’s failure to provide a not guilty final mandate constituted error.” *Id.* at 297, 620 S.E.2d at 909.

In order to consider whether such error constituted plain error and required a new trial, this Court identified “three factors that must be weighed in determining whether the failure to give an appropriate not guilty mandate [rose] to the level of plain error.” *Jenrette*, __ N.C. App. at __, 763 S.E.2d at 412. First, we must consider the challenged jury instructions “in their entirety.” *McHone*, 174 N.C. App. at 297, 620 S.E.2d at 909. Second, we need to “consider the content and form of the . . . verdict sheet [for the offense that is the subject of the challenged instruction] in determining whether the failure to provide a not guilty mandate constitutes plain error.” *Id.* Third, we need to consider the instructions and verdict sheet for the other offenses in the case. *See id.* at 298, 620 S.E.2d at 909.

With respect to the first factor, this Court in *McHone* determined that, “in the absence of a final not guilty mandate,” the challenged instructions “essentially pitted one theory of first degree murder against the other, and *impermissibly suggested* that the jury should find that the killing was perpetrated by [the] defendant on the basis of at least one

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of the theories.” *Id.* at 297, 620 S.E.2d at 909. Thus, we concluded that instructing the jury “‘not [to] return a verdict of guilty’ as to each theory of first degree murder [did] not comport with the necessity of instructing the jury that it *must or would* return a verdict of not guilty should they completely reject the conclusion that defendant committed first degree murder.” *Id.* (first alteration in original).

With respect to the second factor, this Court in *McHone* recognized that the verdict sheet “only provided a space for an answer to ‘Guilty of first-degree murder,’” *State v. Wright*, 210 N.C. App. 697, 705, 709 S.E.2d 471, 476 (citing *McHone*, 174 N.C. App. at 297, 620 S.E.2d at 909), *disc. review denied*, 365 N.C. 332, 717 S.E.2d 394 (2011), but “the verdict sheet itself did not provide a space or option of ‘not guilty.’” *McHone*, 174 N.C. App. at 298, 620 S.E.2d at 909. Consequently, “while the content and form of the verdict sheet did not compel the jury to return a verdict of guilty insofar as it stated ‘if’ it found defendant guilty of first degree murder,” *id.*, “we repeat[ed] our observation that it failed to afford exactly that which the court initially informed the jury it would be authorized to return — a not guilty verdict.” *Id.*

Finally, with respect to the third factor, this Court in *McHone* considered the instructions and verdict sheets given to the jury for the other charge in that case, which was armed robbery and its lesser-included offense of larceny. *See id.* For these offenses, the trial court *did* provide a not guilty mandate in conformity with the pattern jury instructions, and the verdict sheet *did* include a space for a not guilty verdict. *Id.* Thus, we determined that, “[r]ather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge,” *id.*, the presence of a not guilty final mandate as to the taking offenses, as well as the content and form of the verdict sheet on the taking offenses, “likely *reinforced* the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.” *Id.* Thus, “based *not only* on the importance of the jury receiving a not guilty mandate from the presiding judge, but also on the form and content of the particular verdict sheets utilized in this case,” *id.* at 299, 620 S.E.2d at 910 (emphasis added), this Court concluded that “the trial court’s inadvertent omission tipped the scales of justice in favor of conviction and *impermissibly suggested* that the defendant must have been guilty of first degree murder on some basis.” *Id.*

Unlike the alternative theories of first-degree murder that were the subject of the challenged instruction in *McHone*, which “essentially

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pitted one theory of first degree murder against the other,” *id.* at 297, 620 S.E.2d at 909, in the present case, “there was nothing that would support the proposition that the trial court impermissibly suggested that [Defendants] must be guilty” of robbery with a firearm or common law robbery. *See Wright*, 210 N.C. App. at 706, 709 S.E.2d at 477. While the better practice would have been for the trial court to have expressly instructed the jury on the not guilty mandate, each verdict sheet for the four counts of robbery with a firearm for Defendant Calderon and Defendant Miller provided the following options: “Guilty of Robbery With a Firearm . . . OR Guilty of Common Law Robbery . . . OR Not Guilty.” Thus, the verdict sheets for each of the charges, including those for the unchallenged offenses of attempted robbery with a firearm and possession of a firearm by a felon, “clearly informed the jury of its option of returning a not guilty verdict.” *See Jenrette*, __ N.C. App. at __, 763 S.E.2d at 414. “[W]e are satisfied that any confusion that may have arisen stemming from the trial court’s instructions was remedied by the verdict sheet[s], which — as discussed above — clearly provided an option of not guilty” for each charge against Defendants. *See id.* at __, 763 S.E.2d at 417. Additionally, since we have determined that the trial court’s instruction did not impermissibly suggest that Defendants must be guilty, we also conclude that the other charges, which included not guilty mandates that adhered to the pattern jury instructions, did not reinforce that the jury should return a guilty verdict. Therefore, while it was error for the trial court to fail to deliver the not guilty mandate during its instruction on the offenses of robbery with a firearm and common law robbery, we hold this error does not rise to the level of plain error.

III. Sufficiency of Evidence of Attempted Robbery With A Firearm

[2] Defendants next contend the trial court erred by denying their respective motions to dismiss the charges of attempted robbery with a firearm of Mr. Allen because the evidence was insufficient to support such convictions. Again, we disagree.

“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). “The evidence is to be considered in the light most favorable to the State; the State

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is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.” *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. “[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.” *Id.*

The elements of robbery with a dangerous weapon are: “(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another[;] (2) by use or threatened use of a firearm or other dangerous weapon[;] (3) whereby the life of a person is endangered or threatened.” *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011), *disc. review dismissed*, 366 N.C. 583, 739 S.E.2d 842 (2013); *see also* N.C. Gen. Stat. § 14 87(a) (2013). In other words, “[a]rmed robbery requires both an act of possession of a weapon and an act whereby the weapon is used to endanger the life of the victim” and “the use of force must be such as to induce the victim to part with the property.” *Cf. State v. Dalton*, 122 N.C. App. 666, 671, 471 S.E.2d 657, 660–61 (1996) (holding that the trial court erred by denying the defendant’s motion to dismiss the charge of robbery with a dangerous weapon where the victim had been asleep on the sofa in her house when the defendant had seen the victim’s purse on the floor and removed it from her house because “[t]he taking of the purse occurred while [the victim] was asleep . . . [and,] therefore, she could not have known of the presence of the knife and could not have been induced by it to part with her purse”). “[T]he question in an armed robbery case is whether a person’s life was in fact endangered or threatened by [the robber’s] possession, use[,] or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life.” *Hill*, 365 N.C. at 279, 715 S.E.2d at 845 (second alteration in original) (emphasis in original omitted).

“Acting in concert means that the defendant is ‘present at the scene of the crime’ and acts ‘together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.’” *State v. Graham*, 186 N.C. App. 182, 197, 650 S.E.2d 639, 649 (2007) (quoting *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979)), *disc. review denied and appeal dismissed*, 362 N.C. 477, 666 S.E.2d 765 (2008). “Under the theory of acting in concert, if two or more persons join in a purpose to commit a crime, each person is responsible for all unlawful acts committed by the other persons as long as those acts are committed in furtherance of the crime’s common purpose.” *State v. Hill*, 182 N.C. App. 88, 92–93, 641 S.E.2d 380, 385 (2007) (citing *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)).

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Therefore, in order to consider whether there was sufficient evidence to convict a defendant of committing robbery with a dangerous weapon under a theory of acting in concert, “the State need not present evidence that [the] defendant actually possessed the dangerous weapon.” *Id.* at 93, 641 S.E.2d at 385. “The State must only show that defendant acted in concert to commit robbery and that his co defendant used the dangerous weapon in pursuance of that common purpose to commit robbery.” *Id.* (internal quotation marks omitted).

“The elements of attempt are an intent to commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense.” *State v. Key*, 180 N.C. App. 286, 292, 636 S.E.2d 816, 821 (2006) (internal quotation marks omitted), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 399 (2007). “In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof.” *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (internal quotation marks omitted). “[T]he act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation.” *Id.* (internal quotation marks omitted). “[A] defendant can stop his criminal plan short of an overt act on his own initiative or because of some outside intervention. However, once a defendant engages in an overt act, the offense [of attempt] is complete[.]” *Key*, 180 N.C. App. at 292, 636 S.E.2d at 821–22 (first and third alterations in original) (internal quotation marks omitted). While it “need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.” *Price*, 280 N.C. at 158, 184 S.E.2d at 869 (internal quotation marks omitted). “[A]n attempt to rob another person of personal property . . . occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person.” *Id.* at 157–58, 184 S.E.2d at 869 (citation omitted).

In *State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996), the defendant confessed to killing a man who was sleeping in the driver’s seat of a van. See *Miller*, 344 N.C. at 665, 477 S.E.2d at 920. The defendant also stated that, after he shot the man, he did not take any money from him because the defendant “was scared.” *Id.* On appeal, the defendant argued there was insufficient evidence to uphold his conviction of attempted armed robbery because “the evidence was insufficient to show that his actions

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advanced beyond a mere preparation to commit robbery.” *Id.* at 667, 477 S.E.2d. at 921. However, the Court had previously determined that “evidence was sufficient to support a conviction for attempted armed robbery where the defendant placed his hand on a pistol and began to withdraw it from a purse with the intent of completing the substantive offense of armed robbery through its use.” *Id.* at 669, 477 S.E.2d. at 922 (citing *State v. Powell*, 277 N.C. 672, 678–79, 178 S.E.2d 417, 421 (1971)). Thus, in *Miller*, although the victim was asleep in the van, the Court concluded that “[t]he evidence clearly show[ed the defendant] had already committed an overt act in furtherance of the crime well before he left the scene . . . [o]nce defendant placed his hand on the pistol to withdraw it with the intent of shooting and robbing [the victim].” *Id.* at 670, 477 S.E.2d at 922. Moreover, “[t]he fact that [the defendant] did not take the money [from the victim was] irrelevant.” *Id.*

Here, Defendants argue there was insufficient evidence to prove that either of them unlawfully attempted to deprive Mr. Allen of personal property or that Mr. Allen’s life was threatened or endangered. However, the evidence tended to show that Defendants and Mr. Moore planned to rob Bobbie Yates of marijuana, but that once they were informed there was a poker game going on in the apartment, they retrieved a third weapon and returned to Ramblewood for the purpose of robbing the people present in the apartment. Once Defendants and Mr. Moore entered the apartment, Mr. Moore took the money off the kitchen table where several of the people were playing poker, and proceeded to search their pockets for more money. The robbery lasted between two and four minutes and, during the course of the robbery, Defendants continuously pointed their weapons at the people in the apartment, which had an open floor plan; Defendant Miller had a nine-millimeter pistol, and Defendant Calderon brandished a twenty-two-caliber pistol. After Mr. Moore had taken money from the people seated around the kitchen table, Mr. Moore, with his shotgun in hand, approached Mr. Allen, who was “passed out” or asleep in the living room, as Defendants continued to point their weapons at the people in the apartment. When Defendants and Mr. Moore prepared to leave the apartment, they told the people to remain in the apartment for ten minutes, or else they would kill them.

When viewed in the light most favorable to the State, we conclude that this evidence is sufficient to show that Defendants, acting in concert with Mr. Moore, had the specific intent to deprive Mr. Allen of his personal property by endangering or threatening his life with a dangerous weapon and took overt acts to bring about this result. Although Mr. Moore may not have reached the “last proximate act to the

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consummation of the offense” — because Mr. Allen was “passed out” or asleep and therefore could not be induced to give up his money due to the threat that Defendants’ weapons presented, and because no one saw Mr. Moore take any money from Mr. Allen’s pockets — Defendants and Mr. Moore did an “overt act calculated and designed” to rob Mr. Allen when Defendants brandished their weapons in the open apartment as Mr. Moore moved toward Mr. Allen with the intent to take money from his pockets. *See Price*, 280 N.C. at 157–58, 184 S.E.2d at 869. Therefore, we hold the trial court did not err by denying Defendants’ motions to dismiss the charges of attempted armed robbery of Mr. Allen against both Defendants.

IV. Challenge to Jury Instructions on Acting in Concert

[3] Defendant Calderon next contends that he could not have been convicted of the attempted robbery of Mr. Allen under the theory of acting in concert because the trial judge did not specifically instruct the jury on acting in concert in its charge on that offense and, thus, Mr. Moore’s actions could not have been imputed to Defendant Calderon.

“This Court reviews jury instructions contextually and in its entirety.” *State v. Blizzard*, 169 N.C. App. 285, 296, 610 S.E.2d 245, 253 (2005) (internal quotation marks omitted). “The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.” *Id.* at 296-97, 610 S.E.2d at 253 (internal quotation marks omitted). “The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction.” *Id.* at 297, 610 S.E.2d at 253 (alteration in original) (internal quotation marks omitted). “Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” *Id.* (internal quotation marks omitted).

In the present case, the parties conducted a charge conference in chambers. When the court announced that it was “time for our on-the-record charge conference,” the court read out the extensive list of the pattern jury instructions it intended to give, which included the following:

104.35, flight in general; 104.90, identification of a defendant as a perpetrator; 105.20, impeachment or corroboration by prior statements of a witness; 101.42, when you have multiple defendants charged with the same crimes; 202.10, *acting in concert*; 201.10, *the attempt*

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instructions in general; 217.20 is robbery with a firearm; 217.10, common law robbery.

(Emphasis added.) After reading the list of proposed pattern jury instructions, the court invited the parties to request additional instructions or to indicate whether any of the proposed instructions should be stricken. At this time, Defendant Calderon's counsel stated: "Your Honor, we have no objections. We spent I think a fair amount of time going over that in chambers, as you said, and I think those are the appropriate instructions to be given to the jury."

In its instruction to the jury, the trial court repeated the acting in concert instruction after it gave the instruction for robbery with a firearm and after it gave the instruction for common law robbery. However, the court did not repeat the acting in concert instruction after it gave the instruction for attempted robbery with a firearm. Neither Defendant Calderon nor the State objected to the trial court's seemingly inadvertent omission of the repetition of the acting in concert instruction immediately following the attempted robbery instruction, which was given after the court's instructions for robbery with a firearm and before the court's instructions for common law robbery. Additionally, the record shows that neither Defendant Calderon nor the State requested that the trial court give the acting in concert instruction to the exclusion of the attempted robbery instruction. Nevertheless, looking at the charges to the jury in their entirety, and when considering the evidence presented — that Mr. Moore approached Mr. Allen with the intent of committing robbery while Defendants continuously pointed their weapons at the people from whom Mr. Moore was taking money in the apartment — we are not persuaded that the trial court's failure to repeat the acting in concert instruction after the attempted robbery instruction was likely to have misled the jury. Accordingly, we overrule this issue on appeal.

V. Instruction on Lesser-Included Offenses

[4] Defendant Calderon and Defendant Miller finally contend the trial court committed plain error by failing to instruct the jury on attempted larceny and attempted common law robbery, respectively, as the lesser-included offenses for the charge of attempted armed robbery of Mr. Allen. Defendants assert that, because Mr. Allen was "passed out" or asleep at the time that Mr. Moore attempted to take property from Mr. Allen's pockets, Mr. Allen's life was not endangered or threatened by Defendants' weapons, and the State's evidence was insufficient to support Defendants' respective convictions of the attempted armed robbery of Mr. Allen. Again, we disagree.

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As we discussed above, an *attempt* to rob another person of personal property “occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person,” *see Price*, 280 N.C. at 157–58, 184 S.E.2d at 869, and “once a defendant engages in an overt act, the offense [of attempt] is complete[.]” *Key*, 180 N.C. App. at 292, 636 S.E.2d at 821–22 (second alteration in original) (internal quotation marks omitted). Because Defendants were convicted of the *attempted* armed robbery of Mr. Allen and not of robbery with a firearm with respect to Mr. Allen, we conclude that Defendant Calderon’s reliance on *Dalton*, 122 N.C. App. at 671, 471 S.E.2d at 660–61 (arresting judgment on the charge of robbery with a dangerous weapon after concluding that the defendant took the victim’s purse from her home while she was asleep because the victim “could not have known of the presence of the knife [during the time that her purse was taken] and could not have been induced by [the knife] to part with her purse”), is misplaced.

In their arguments in support of this issue on appeal, Defendants do not dispute that the State presented evidence showing that Defendants and Mr. Moore armed themselves and went to the apartment for the purpose of robbing the people therein. Defendants then pointed their weapons at the people in the apartment as Mr. Moore rifled through several people’s pockets, including Mr. Allen’s, for the purpose of taking their money. Since “[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense *and to acquit him of the greater*,” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (emphasis added), we conclude that the trial court was not required to give an instruction on a lesser-included offense for the charge of attempted armed robbery of Mr. Allen. Because we hold the trial court did not err by failing to instruct the jury on the lesser-included offenses of attempted larceny or attempted common law robbery, we decline to address Defendants’ remaining assertions with respect to this issue on appeal.

NO PREJUDICIAL ERROR.

Judges HUNTER, JR. and DIETZ concur.

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[242 N.C. App. 141 (2015)]

STATE OF NORTH CAROLINA

v.

DANIEL JOSEPH CLARK, DEFENDANT

No. COA14-1277

Filed 7 July 2015

Constitutional Law—Confrontation Clause—DMV records—not created solely as evidence against defendant

Defendant's right to confrontation was not violated in a prosecution for driving with a revoked license where the trial court admitted defendant's driving record, a document authenticating orders suspending his license and stating that they were mailed to his house, and two orders indefinitely suspending his driving license. None of the records were created for the sole purpose of providing evidence against defendant.

Appeal by Defendant from judgment entered 24 June 2014 by Judge C. Thomas Edwards in Caldwell County Superior Court. Heard in the Court of Appeals 7 April 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen N. Bolton, for the State.

Winifred H. Dillon, for the Defendant.

DILLON, Judge.

Daniel Joseph Clark ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of driving while his license was revoked and driving while displaying an expired license plate registration. The question raised in this appeal is whether the trial court violated Defendant's rights under the Confrontation Clause of the federal Constitution by allowing the State to introduce certified copies of his driving record and revocation orders from the Division of Motor Vehicles ("DMV"). We find no error.

I. Background

Defendant was found guilty of driving while his license was revoked and driving while displaying an expired registration. The court sentenced Defendant to a suspended sentence and placed him on supervised probation. Defendant entered notice of appeal in open court.

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II. Analysis

In his brief, Defendant only argues error in his conviction for driving while his license was revoked. Therefore, any challenge to his conviction for driving while displaying an expired registration plate is waived. *See* N.C. R. App. P. 28.

In his sole argument on appeal, Defendant contends that the trial court erred in allowing the introduction of certain documentary evidence over his objection. The documents in question are (1) a copy of his driving record certified by the Commissioner of Motor Vehicles (“DMV Commissioner”); (2) two orders indefinitely suspending Defendant’s drivers’ license; and (3) a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In this last document, the DMV employee certified that the suspension orders were mailed to Defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV.

Defendant contends that the introduction of these documents violated his constitutional right to confront and cross-examine his supposed accusers, the DMV Commissioner and the DMV employee. We disagree.

Our review is *de novo*. *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. Our resolution of the constitutional issue in the present appeal requires a brief review of several landmark United States Supreme Court decisions and the impact of those decisions on the admissibility of certain documentary evidence under our law.

The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004), that the constitutional guarantee to confrontation prohibits the introduction of testimonial hearsay unless the declarant is unavailable to testify at trial and the defendant has had a previous opportunity to cross-examine him or her. *Id.* at 68, 124 S. Ct. at 1374. Justice Scalia, writing for the majority, offered three, alternate formulations of the definition of “testimonial” within the meaning of the Clause: (1) “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably

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expect to be used prosecutorially”; (2) “extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and (3) “statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]” *Id.* at 51-52, 124 S. Ct. at 1364.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed.2d 314 (2009), the Supreme Court clarified that documents – however labeled – which contain declarations of fact made for the purpose of establishing that fact in a criminal trial qualify as testimonial, and a defendant has the right to confront and cross-examine a hearsay declarant who creates such a document just as he would any of his other accusers. *Id.* at 310-11, 129 S. Ct. at 2532. The Court noted that while “[a] clerk c[an] by affidavit *authenticate* or provide a copy of an otherwise admissible record,” he or she cannot “*create* a record for the sole purpose of providing evidence against a defendant.” *Id.* at 322-23, 129 S. Ct. at 2539 (emphasis in original).

Finally, in *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 180 L. Ed.2d 610 (2011), the Court confirmed that a fact attested to in a hearsay document created for the purpose of proving that fact at trial is only admissible where the defendant is afforded the opportunity to confront and cross-examine the original hearsay declarant, and this constitutional demand is not met by the affirmation in court of the original declarant’s prior statement by somebody else similarly qualified. *Id.* at ___, 131 S. Ct. at 2713. “A document created solely for an evidentiary purpose,” the Court reiterated, “made in aid of a police investigation, ranks as testimonial.” *Id.* at ___, 131 S. Ct. at 2717 (internal marks omitted).

Our appellate courts have recognized that certain records kept by State agencies are admissible in criminal prosecutions where the record was not created in contemplation of being used in a criminal trial. *See, e.g., State v. Raines*, 362 N.C. 1, 17, 653 S.E.2d 126, 137 (2007) (detention center incident reports); *State v. Gardner*, ___ N.C. App. ___, ___, 769 S.E.2d 196, 199 (2014) (GPS tracking reports). However, no reported North Carolina case has yet to address the admissibility of records created and maintained by DMV under *Crawford*, *Melendez-Diaz*, and *Bullcoming*. Courts in other jurisdictions, though, have held that records created and maintained by state driving license agencies *as part of their regular administration and in compliance with governing law* are not testimonial. *See Boone v. Com.*, 758 S.E.2d 72, 76 (2014) (Virginia Court of Appeals); *State v. Kennedy*, 846 N.W.2d

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517, 524-25 (2014) (Iowa Supreme Court); *State v. Leibel*, 838 N.W.2d 286, 295-97 (2013) (Nebraska Supreme Court); *People v. Nunley*, 821 N.W.2d 642, 652-53 (2012) (Michigan Supreme Court); *State v. Murphy*, 991 A.2d 35, 43 (2010) (Maine Supreme Court). However, where the record is created by the agency *for the purpose of proving a fact in a criminal trial*, courts have held that the record *is* testimonial. See *Kennedy*, 846 N.W.2d at 526-27 (Iowa Supreme Court); *State v. Jasper*, 271 P.3d 876, 887 (2012) (Washington Supreme Court); *Com. v. Parenteau*, 948 N.E.2d 883, 890 (2011) (Massachusetts Supreme Court); *People v. Pacer*, 847 N.E.2d 1149, 1153-54 (2006) (New York Court of Appeals).

In the present case, to convict Defendant of driving while his license was revoked, the State was required to prove that he “had actual or constructive knowledge of the revocation[.]” *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989) (internal marks omitted). Proof of actual or constructive knowledge can be established by demonstrating compliance with N.C. Gen. Stat. § 20-48. *State v. Curtis*, 73 N.C. App. 248, 251, 326 S.E.2d 90, 92 (1985). N.C. Gen. Stat. § 20-48 provides, in relevant part:

Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, . . . such notice shall be . . . by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. . . . Proof of the giving of notice in either such manner may be made by a notation in the records of the Division that the notice was sent to a particular address and the purpose of the notice.

N.C. Gen. Stat. § 20-48 (2012).

To prove that Defendant’s license was revoked and that he knew it was revoked, the State moved to admit Defendant’s driving record, the document attached to the orders indefinitely suspending his license, and the orders themselves. The bottom of each page of the driving record bears the following certification:

I certify that the foregoing is a true copy of the driving record of the within named person on the file in the Driver License Section of the N.C. Division of Motor Vehicles.

Signed /s/ Kelly J. Thomas /s/
Commissioner of Motor Vehicles

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The document attached to the suspension order contained a similar certification by the DMV Commissioner. The DMV employee's attestation to mailing the suspension order stated as follows:

I certify that I am an employee of the North Carolina Division of Motor Vehicles, and that the original of attached document was deposited by me in the United States mail on the mail date of the attached order in an envelope, postage paid, addressed as appears thereon, which address is shown by the records of the Division as the address of the person named on the document.

Signed /s/ Luann Garrett /s/

EMPLOYEE N.C. DIVISION OF MOTOR VEHICLES

Thus, while hearsay, the portions of the documents certifying their accuracy and attesting that the suspension orders were sent to Defendant prior to the offense date of his charge constitute substantive evidence of his commission of the offense. However, none of these records were "create[d] . . . for the sole purpose of providing evidence against a defendant." *Melendez-Diaz*, 557 U.S. at 323, 129 S. Ct. at 2539. Instead, the records were created by DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked. *See* N.C. Gen. Stat. §§ 20-26(a), -48 (2012). As the Supreme Court explained in *Melendez-Diaz*, "records . . . created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial . . . are not testimonial." 557 U.S. at 324, 129 S. Ct. at 2539-40. Therefore, we hold that the records in the present case are non-testimonial. Accordingly, this argument is overruled.

III. Conclusion

We hold that the copy of the driving record, the document authenticating the suspension orders and stating that it was mailed to the person named in the orders, and the two orders indefinitely suspending Defendant's license, are non-testimonial. Therefore, the admission of this evidence without accompanying testimony did not violate Defendant's right to confrontation.

NO ERROR.

Judges ELMORE and GEER concur.

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STATE OF NORTH CAROLINA

v.

LEONARD HARDY

No. COA14-1320

Filed 7 July 2015

1. Evidence—testimony—other witnesses—response to cross-examination

The trial court did not err in a breaking and entering, larceny after breaking and entering, possession of stolen property, and willful and wanton injury to real property case by failing to strike the victim's testimony. Where a witness who has not offered testimony identifying defendant as the perpetrator refers in response to cross-examination to hearsay evidence that "other witnesses" had identified defendant and where a separate witness positively identified defendant during the trial, any error by the trial court in failing to strike the hearsay testimony was not prejudicial.

2. Real Property—injury to real property—motion to dismiss—sufficiency of evidence—air conditioner

The trial court did not err by denying defendant's motion to dismiss the injury to real property charge based on alleged insufficient evidence that an air conditioner was real property. Given the manner in which the air-conditioner was attached to a mobile home, the fact that it was "gutted" instead of removed entirely, and the fact that it was attached by the property owner to the rental property for the use and enjoyment of the renters, there was substantial evidence in this case that the air conditioner was real property and not personal property.

3. Real Property—jury instruction—classification—air conditioner

The trial court did not err by instructing the jury that an air conditioner constituted real property. The air-conditioner was properly classified as real property given the nature and circumstances surrounding its annexation to a mobile home.

4. Damages and Remedies—restitution—amount—injury to property—sufficiency of evidence

The trial court did not err in its restitution order by requiring defendant to pay \$7,408.91. There was sufficient evidence to support the trial court's order awarding restitution based on a handyman's invoice. Further, N.C.G.S. § 15A-1340.34 allows a defendant who

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damages property to be held responsible for all damage directly and proximately caused by the injury to property, including reasonable costs of repair and replacement, especially in a case like this where an air-conditioner was completely inoperable due to defendant's actions.

5. Sentencing—felony larceny—felony possession of stolen goods

The trial court erred by sentencing defendant for both felony larceny and felony possession of stolen goods, and the trial court's order arresting judgment for felony possession of stolen goods did not cure the error. The case was remanded for resentencing.

Appeal by defendant from judgment entered 14 February 2012 by Judge W. Allen Cobb, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 7 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth A. Fisher, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah H. Love, for defendant.

INMAN, Judge.

This case presents, among other issues, the question of whether an air-conditioning unit attached to the exterior of a mobile home, which unit is dismantled and destroyed causing extensive water damage to the home, is correctly classified as real property or personal property for the purpose of a criminal charge and conviction. Based on the record below, the answer in this case is real property.

Defendant appeals the judgment entered after a jury found him guilty of breaking and entering, larceny after breaking and entering, possession of stolen property, and willful and wanton injury to real property. On appeal, defendant contends that: (1) the trial court erred in failing to strike the victim's testimony that "other witnesses" saw defendant outside her home on the day the air-conditioner was damaged; (2) the trial court erred in denying defendant's motion to dismiss the injury to real property charge because there was insufficient evidence that the air-conditioner was real property; (3) the trial court erred by instructing the jury that the air-conditioner constituted real property; (4) the restitution order requiring defendant to pay \$7,408.91 was not supported by evidence; and (5) defendant is entitled to a new sentencing hearing because

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it is unclear whether the trial court based his sentence on defendant's conviction for felony possession of stolen goods.

After careful review, we conclude that defendant received a trial free of error but remand for resentencing.

Background and Procedural History

On 25 July 2011, Zulema Bass ("Ms. Bass") arrived home and noticed that her mobile home was hot inside even though the air-conditioner was on. After hearing a loud noise outside, she asked her fifteen-year-old son Brendell Bass ("Brendell") to investigate. Brendell went to the back door and began screaming that a man was out there. Ms. Bass ran to the door and saw a man riding away on a bicycle; she only saw half of the man's face and was unable to identify him. Ms. Bass went outside and saw that the air-conditioning unit was "demolished" and noticed a twisted pipe on the ground beside the unit. She also noticed that there was extensive water damage under her home from "pipes leaking everywhere." Ms. Bass called 911. The State did not elicit any identification testimony from Ms. Bass regarding whether the man she saw that day was defendant.

On cross-examination, defense counsel asked Ms. Bass about her inability to identify defendant to police officers. Ms. Bass responded that she could not identify him because she "did not see his whole face . . . when [defendant] was riding off." Defense counsel then asked: "So you can't tell this jury that it was [defendant] that was outside your home that day; is that correct?" Ms. Bass replied: "That was him, because I had other witnesses that saw him go on the bicycle in the woods, and my—also my son was there." Defense counsel immediately objected that the answer was nonresponsive and requested that her answer be stricken from the record. The trial court overruled the objection. Ms. Bass did not offer any further testimony clarifying her statement about "other witnesses."

Brendell also testified at trial that, after hearing "loud" noises, he saw a man coming out of the crawlspace beneath their home holding copper wire and went out to confront him. At trial, he identified defendant as the man he had seen and confronted. Brendell testified that once defendant heard him yell, defendant threw the copper wire on the ground beside a tree. Before Brendell was able to answer the State's question as to whether he had ever seen defendant before, defense counsel objected, and the trial court excused the jury to determine whether Brendell's testimony was "objectionable."

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During *voir dire*, Brendell testified that he had seen defendant around the neighborhood about four or five times, including one particular incident where he saw defendant take a refrigerator out of another house in the neighborhood. The trial court allowed Brendell to testify to the jury that he had seen defendant around the neighborhood, but did not allow any testimony concerning the refrigerator incident.

Detective Parchman, the officer who responded to the 911 call from the mobile home, corroborated Brendell's testimony, claiming that Brendell identified the man he saw as defendant.

Jack Gregory ("Mr. Gregory"), a handyman with 40 years of experience, testified that he went to Ms. Bass's mobile home to inspect and attempt to repair the air-conditioner. Mr. Gregory explained that Ms. Bass's air-conditioner was a two-piece unit. The outside unit was a condensing unit, which sat on the ground outside the mobile home and is connected to a second unit. The second unit, known as the A-coil, was located on the inside of the home and sat on the top of the home's heater. A high pressure copper pipe beneath the mobile home connected the outside unit to the indoor A-coil. Mr. Gregory testified that Ms. Bass's outside condensing unit had been completely "gutted." The compressor had been completely removed, and the wiring in the control box had been pulled out. Almost the entire high pressure copper piping that ran beneath the home had been removed. Mr. Gregory also noted some water line damage in the crawlspace of the mobile home; the water lines were broken so extensively that the entire back side of the brick wall on the underpinning was "soaked through." The air-conditioner was inoperable and beyond repair.

Dale Davis ("Mr. Davis") testified that he owned the mobile home but used it as a rental property. He testified that he had received an estimate of over \$6,000 to repair "just the AC" from Jackson & Sons.

At the end of the State's evidence, defense counsel made a motion to dismiss the injury to real property charge because the air-conditioning unit "would be more better described as personal property" since part of it was outside of the mobile home's crawlspace. The trial court denied the motion.

During jury instructions, the trial court instructed the jury on the charge of injury to real property as follows:

The [d]efendant has also been charged with willful and wanton injury to real property. For you to find the

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[d]efendant guilty of this offense the State must prove two things beyond a reasonable doubt:

First, that the [d]efendant injured the air conditioner of Dale Davis. An air conditioner affixed to a house is real property.

And second, that the [d]efendant did this willfully and wantonly[.]

The jury found defendant guilty of all charges. Before judgment was entered, defendant pled guilty to attaining habitual felon status in exchange for the State's recommendation of a mitigated sentence.

On 14 February 2012, the trial court sentenced defendant to 77 months to 102 months imprisonment and ordered defendant to pay \$7,408.91 in restitution. The restitution amount was based on the amount Mr. Davis paid to Mr. Gregory to inspect the air-conditioner and fix the water pipes, \$918.91, and an estimate from Jackson & Sons to replace the "heat pump" for \$6,490.00.

On the same day as judgment was entered but after sentencing defendant, the trial court arrested judgment on defendant's conviction for possession of stolen goods. The trial court did not modify defendant's sentence. Defendant appeals.¹

Analysis**I. Victim's Testimony Regarding "Other" Witnesses**

[1] Defendant first argues that the trial court erred by overruling defense counsel's objection and motion to strike Ms. Bass's testimony concerning her knowledge that defendant committed the crimes because "other witnesses" identified him as the perpetrator. Specifically, defendant contends that Ms. Bass's testimony was nonresponsive and beyond the scope of defense counsel's question, was hearsay, and was not based on personal knowledge. We conclude that defendant was not prejudiced by the testimony.

"The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Taylor*, 154 N.C. App. 366, 372, 572 S.E.2d 237, 242 (2002). The burden is on the defendant to show that he was prejudiced by the admitted

1. On 27 December 2012, this Court entered an order allowing defendant's petition for writ of certiorari to review the judgment entered.

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evidence. *State v. Durham*, 175 N.C. App. 202, 207, 623 S.E.2d 63, 67 (2005); *see also* N.C. Gen. Stat. § 15A-1443(a) (2013). “If there is overwhelming evidence of defendant’s guilt or an abundance of other evidence to support the State’s contention, the erroneous admission of evidence is harmless.” *State v. Williams*, 164 N.C. App. 638, 644, 596 S.E.2d 313, 317 (2004).

Even if we were to assume, without deciding, that the trial court erred in allowing the testimony and that Ms. Bass’s testimony did not constitute invited error because it was nonresponsive, *see State v. Wilkerson*, 363 N.C. 382, 412, 683 S.E.2d 174, 192 (2009) (noting that because the witness’s testimony constituted a “nonresponsive outburst,” defense counsel did not “invite” the error), defendant is unable to show that he was prejudiced by this testimony. Defendant argues that Ms. Bass’s testimony “impermissibly bolstered the identification of [defendant] as the perpetrator.” However, any value in Ms. Bass’s nonspecific testimony was negligible given the strength of other undisputed identification evidence. Brendell testified that, on the day in question, he saw defendant coming out of the crawlspace of the mobile home carrying copper wire, and that he had seen defendant in the neighborhood several times over the years. While Brendell admitted that he could not specifically recall defendant’s name on the day of the incident, he was able to provide it to Detective Parchman two days later. Detective Parchman corroborated this evidence, testifying that Brendell positively identified defendant as the man he saw coming out of the crawlspace.

In light of Brendell’s testimony, which was corroborated by Detective Parchman and not refuted by other evidence, we believe that Ms. Bass’s allegedly unresponsive and hearsay testimony had little or no effect on the jury’s verdict of guilt. *See State v. Anderson*, 177 N.C. App. 54, 62, 627 S.E.2d 501, 505 (2006) (holding that our standard of review to determine whether a trial court committed prejudicial error in admitting evidence is “whether a reasonable possibility exists that the evidence, if excluded, would have altered the result of the trial”). Furthermore, we note that the only other reference to Ms. Bass’s allegations that “other witnesses” saw defendant ride off on a bicycle that day occurred during cross-examination of Brendell when defense counsel asked if he had “asked other folks in the neighborhood if they had seen anybody on a bike.” Brendell replied that he had, but he never testified about what others had told him. Defense counsel then asked Brendell whether he had seen anybody else in the neighborhood besides defendant ride a bike. Brendell replied that he had.

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Although it seems likely that Ms. Bass's testimony that "other witnesses" had identified defendant as the perpetrator was based on double hearsay—conversations Brendell had with "other folks"—the probative effect of her testimony was negligible, given that Brendell, in his testimony, never identified the person "others" saw riding a bike, and given that Brendell identified defendant on an entirely independent basis. Therefore, in sum, any error in the admission of Ms. Bass's testimony was harmless.

Defendant's reliance on *State v. Mitchell*, 270 N.C. 753, 155 S.E.2d 96 (1967), is misplaced. In *Mitchell*, 270 N.C. at 756, 155 S.E.2d at 99, the defendant was charged with armed robbery and felonious assault for opening the victim's car door, taking the victim's wallet, and shooting the victim. The victim testified that "somebody had told him [that] defendant had admitted [to] taking" the wallet. *Id.* During cross-examination, the victim's identification of defendant as the perpetrator was "considerably shaken." *Id.* at 757, 155 S.E.2d at 96. Thus, the inadmissible hearsay was prejudicial because: (1) the evidence constituted an admission of guilt by the defendant, and (2) it was the only significant evidence offered to identify the defendant as the perpetrator. Here, Ms. Bass's testimony that "other witnesses" saw defendant riding his bike that day did not suggest an admission of guilt by defendant. Further, a separate witness, Brendell, in his testimony before the jury identified defendant as the perpetrator. Therefore, *Miller* is distinguishable and is not controlling.

In sum, where a witness who has not offered testimony identifying defendant as the perpetrator refers in response to cross examination to hearsay evidence that "other witnesses" had identified defendant and where a separate witness positively identified defendant during the trial, any error by the trial court in failing to strike the hearsay testimony was not prejudicial.

II. Denial of Motion to Dismiss

[2] Defendant argues that the trial court erred in denying his motion to dismiss the injury to real property charge because there was insufficient evidence that the mobile home's air-conditioner was real property.² Defendant cites *State v. Primus*, __ N.C. App. __, 742 S.E.2d 310 (2013), to support his contention that a mobile home's air-conditioner is personal property. For the reasons explained below, we disagree.

2. Neither party raises any question that the mobile home in this case constitutes real property so, for purposes of this opinion, we will treat the mobile home as real property. See N.C. R. App. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

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This Court reviews a trial court's order denying a defendant's motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Defendant was charged with violating N.C. Gen. Stat. § 14-127, which makes it a crime to willfully and wantonly damage, injure, or destroy real property. Specifically, the indictment charges that defendant injured the air-conditioner in the crawlspace under Ms. Bass's mobile home. On appeal, defendant contends that the *Primus* decision holds as a matter of law that a mobile home air-conditioner is personal property, so that the trial court should have granted his motion to dismiss the charge of injury to real property.

First, we must determine whether *Primus* requires us to classify the mobile home's air-conditioner as personal property. The defendant in *Primus* was convicted of attempted felony larceny and injury to personal property for taking an air-conditioner which had been attached to the victim's mobile home. *Id.* at ___, 742 S.E.2d at 311-12. The defendant had cut the "wires and piping" that secured the air-conditioner to the outside of the mobile home. *Id.* at ___, 742 S.E.2d at 314. At trial, when instructing the jury on the charge of injury to personal property, the trial court stated that "[w]ires and piping connected to an air-conditioning unit are personal property." *Id.*

On appeal, the defendant argued that the trial judge's instruction was "an improper expression of the trial judge's opinion as to a factual issue within the province of the jury." *Id.* at ___, 742 S.E.2d at 313. However, because the trial judge "simply filled in the blanks in the pattern jury instruction for injury to personal property," this Court held that "if the statement amounts to error, it was an instructional error that was not preserved for appeal." *Id.* at ___, 742 S.E.2d at 314. The Court went on to say that, "assuming *arguendo* that the trial judge's instruction to the jury was an opinion as to a factual issue, we think the error is harmless" because the "instruction classifying the wires and piping as personal property was supported by the evidence." *Id.*

Defendant contends that because the *Primus* Court "classified the injury to the air-conditioning unit . . . as injury to personal property, the damage to the air-conditioning unit in this case must also be classified as injury to personal property" based on *In re Civil Penalty*,

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324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, we are only bound by previous cases that decided the same issue as the one raised in the present appeal. *See id.* (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). The only issue addressed in *Primus* was whether the judge’s statement that “[w]ires and piping connected to an air-conditioning unit are personal property” constituted an improper statement of opinion. *Id.* at ___, 742 S.E.2d at 314. This Court did not resolve this issue because, as noted in the opinion, this argument amounted to a challenge to the jury instructions, which was not preserved for appeal. *Id.* Thus, we did not decide whether the classification of the wires and piping as personal property was an instructional error because it constituted an improper statement of the law, the issue raised in this appeal.

Furthermore, while the *Primus* Court did state that the trial court’s classification of “the wires and piping as personal property was supported by evidence,” *see id.*, that conclusion followed the phrase “assuming *arguendo*” and was not relied upon by the Court for its ultimate holding that the trial judge’s instruction did not amount to an improper opinion of the court. *See generally Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 359, 416 S.E.2d 166, 173 (1992) (noting that statements not relied upon for the Court’s ultimate holding are *dicta*). Accordingly, contrary to defendant’s assertions, *Primus* is not binding and does not require a conclusion by this Court that Ms. Bass’s air-conditioner must be classified as personal property.

Given the absence of controlling authority on the matter of whether an air-conditioner attached to a mobile home constitutes real or personal property as a matter of law, we must look at how air-conditioners or other similar types of property are classified not only in the criminal law context but also in property law. Chapter 14, the section of our General Statutes containing our state’s statutory criminal law, does not provide a definition of “real property,” and the only discussion concerning the difference between real property, fixtures, and personal property is in N.C. Gen. Stat. § 14-83.1 titled “Fixtures subject to Larceny,” which abolished the common law distinctions between personal property and personal property affixed to real property, which would include fixtures, for purposes of a larceny charge. Thus, under section 14-83.1, which became effective 1 December 2008, the carrying and taking away of fixtures supports a conviction of larceny whereas, under the common law, it would not. *See also* P. Hetrick & J. McLaughlin, *Webster’s Real Estate Law in North Carolina* § 2.01 (6th ed. 2011) (noting that “[f]ixtures were

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originally personal property but have been attached to land in a more or less permanent manner under such circumstances to be considered in law to have become a part of the real property”).

In contrast to the statute defining larceny to include both personal property and fixtures which are “considered” real property as a matter of law, our General Statutes define as separate offenses injury to real property, a Class 1 misdemeanor under N.C. Gen. Stat. § 14-127, and injury to personal property, a Class 1 or 2 misdemeanor, depending upon the amount of damage caused, under N.C. Gen. Stat. § 14-160. Thus, the classification of the type of property a defendant is charged with injuring is a necessary determination.

“A fixture has been defined as that which, though originally a movable chattel, is, by reason of its annexation to land, or association in the use of land, regarded as a part of the land, partaking of its character.” *Little v. Nat’l Serv. Indus., Inc.*, 79 N.C. App. 688, 692, 340 S.E.2d 510, 513 (1986) (quoting 1 Thompson on Real Property). While fixture law is usually applicable in controversies involving possession of or interests in the fixture, it is relevant in this case to determine whether the air-conditioner here was a fixture which would properly be classified “in law” to be part of the real property.

[S]everal tests for resolving the question of whether a chattel attached to real property becomes real property or remains personalty have been referred to in the cases. They include (1) the manner in which the article is attached to the realty; (2) the nature of the article and the purpose for which it is attached to the realty; and (3) the intention with which the annexation of the article to the realty is made. Under the modern view, the controlling test is the intention with which the annexation is made.

Little, 79 N.C. App. at 692, 340 S.E.2d at 513 (internal citations omitted); see also *Moore’s Ferry Dev. Corp. v. City of Hickory*, 166 N.C. App. 441, 445-46, 601 S.E.2d 900, 903 (2004).

These concepts of how and when personal property becomes so attached to real property that it becomes part of the real property have been applied in the criminal context for charges other than injury to real property. For example, in *State v. Schultz*, 294 N.C. 281, 282, 240 S.E.2d 451, 453 (1978), the defendant was charged with larceny for taking bronze urns and vases that had been attached to grave markers from a cemetery. *Schultz*, 294 N.C. at 282, 240 S.E.2d at 453. At the time, the

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common law definition of larceny was in effect and a person could not be convicted of larceny for taking and carrying away property affixed to the ground, *i.e.*, fixtures. *Id.* at 286, 240 S.E.2d at 455. Although, clearly, the grave markers to which the urns and vases were attached would not be subject to common law larceny because they were “affixed to the soil,” the Court concluded that the urns and vases constituted personal property. *Id.* at 286, 240 S.E.2d at 456. Specifically, the Court noted that although the urns and vases were “fastened to the [bronze grave] markers,” they were attached by “a slight twist so as to make grooves and projections upon the urn or vase fit into prepared slots in the receptacle.” *Id.* However, the urns and vases were “not a part of [the] marker[s].” *Id.* Furthermore, “[t]he [bronze grave] marker serves its contemplated purpose whether or not the urn or vase is so affixed.” *Id.* In contrast, the only purpose for attaching the urns and vases was to prevent them from overturning, and they also could be used for their contemplated purposes regardless of whether they were attached to the grave markers. *Id.* at 287-88, 240 S.E.2d at 456. Finally, the Court noted that, given that the defendant removed a great number of them in a very short period of time, the vases and urns were “easily separated” from the bronze grave markers even though the person who placed them “contemplated their remaining so in place.” *Id.* Accordingly, the Court held that the urns and vases were personal property and could be the subject of the larceny charges. *Id.*

Similarly, in *State v. Patterson*, 2011 WL 2848770, *2 (COA10-1240) (July 19, 2011) (unpublished), the defendant was charged with larceny based on “taking and carrying away the personal property of CSX,” a railroad company. The “personal property” at issue was 4,800 feet of copper signal wire that had been affixed to signal poles. *Id.* at *2. Because the offenses occurred prior to 1 December 2008, N.C. Gen. Stat. § 14-83.1, which, as discussed above, abolished the common law distinction between personal property and personal property affixed to real property for purposes of larceny, did not apply. Therefore, if the copper wire was so affixed to the poles that it became real property, the defendant could not have been guilty of larceny. The *Patterson* Court applied the logic enunciated in *Schultz* to conclude that the copper wire was affixed to real property because: (1) the signal poles themselves were buried up to eight feet into the ground, making them fixtures appurtenant to the land; (2) the copper wires were attached to the signal poles in such a way that removing them would require cutting the wires and they were not, as were the urns at issue in *Schultz*, attached with a “slight twist”; and (3) the attachment of the copper wire to the poles was a “crucial

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part of the contemplated purpose” of both the signal poles and the wire since their purpose was to carry electronic signals along the tracks. *Id.* at *3. Accordingly, “the copper wire was attached to the signal poles, as to make it an integral part of such signal poles and [was], therefore, real property or chattels real.” *Id.* Accordingly, this Court reversed the trial court’s order denying the defendant’s motion to dismiss the felony larceny charge. *Id.*

Even though not controlling in this case, we adopt the logic used in *Schultz* and *Patterson* and concepts of fixture law to determine whether the air-conditioner attached to Ms. Bass’s mobile home was affixed such that “it, too, became an irremovable part of the [mobile home].” *Patterson* at *3. The air-conditioner at issue in this case comprised two separate units: an inside unit, referred to as the A-coil, which sat on top of the home’s heater, and an outside condensing unit, which had a compressor inside of it. The two units were connected by copper piping that ran from the condenser underneath the mobile home into the home. Mr. Gregory testified that the compressor, which was located inside the condensing unit, had been totally “destroyed,” and that although the condensing unit itself remained in place, it was rendered inoperable. Thus, unlike the vases and urns in *Schultz* that could be simply “twisted off,” the entire air-conditioner could not be removed but had to be “gutted” and removed in pieces. Moreover, when defendant cut the copper piping underneath the home, he caused significant damage to the water pipes that were also located in the crawlspace. Thus, here, not only could the air-conditioner not be easily removed from the mobile home but it also could not be easily removed from other systems of the home given the level of enmeshment and entanglement with the home’s water pipes and heater.

While the mobile home could serve its “contemplated purpose” of providing a basic dwelling without the air-conditioner, *see Patterson* *3, the purpose for which the air-conditioner was annexed to the mobile home supports a conclusion that it had become part of the real property. Mr. Davis attached the air-conditioner to the mobile home for the use and enjoyment of Ms. Bass, who was renting the home; thus, a presumption arises that the air-conditioner was attached to enhance the value of the real property and thus became real property. *See Little*, 79 N.C. App. at 692, 340 S.E.2d at 513 (“The intent with which a party annexes a chattel to real property is determined, in large measure, by the relationship of the parties to the land and to each other. For example, when additions are made to land by its owner, it is generally viewed that the purpose of the addition is to enhance the value of the land, and the chattel becomes a part of the land.”).

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In totality, given the manner in which the air-conditioner was attached to the mobile home, the fact that it was “gutted” instead of removed entirely, and the fact that it was attached by the property owner to the rental property for the use and enjoyment of the renters, there was substantial evidence in this case that the air-conditioner was real property and not, as defendant contends, personal property. Therefore, the trial court did not err in denying defendant’s motion to dismiss based on the classification of the air-conditioner as real property.

III. Jury Instruction

[3] Next, defendant argues that the trial court committed reversible error by instructing the jury that “[a]n air conditioner affixed to a house is real property.” Specifically, defendant contends that the classification of the air-conditioner as real property is an incorrect statement of law. We disagree.

N.C. Gen. Stat. § 15A-1232 (2013) provides that “[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.” However, any alleged violation of section 15A-1232 is reviewed to determine whether it constitutes harmless error. *State v. Nelson*, 298 N.C. 573, 597, 260 S.E.2d 629, 646 (1979).

When reviewing jury instructions, they will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. McLean, 205 N.C. App. 247, 252, 695 S.E.2d 813, 817 (2010).

As discussed previously, contrary to defendant’s contention, *Primus* is not controlling on this issue. Furthermore, we conclude that the air-conditioner at issue here was properly classified as real property given the nature and circumstances surrounding its annexation to the mobile home.

IV. Restitution

[4] Next, defendant argues that the trial court erred by ordering defendant to pay \$7,408.91 in restitution because: (1) the amount was not for damages arising directly and proximately out of the offenses committed by defendant; (2) there was insufficient evidence to support the order;

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and (3) the award was not within the scope of permissible bases upon which a trial court may order restitution. We disagree.

The trial court may order a defendant “make restitution to the victim or the victim’s estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant.” N.C. Gen. Stat. § 15A-1340.34(b) (2013). We review *de novo* whether the restitution order was supported by evidence at trial or sentencing. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011). “However, when there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal.” *Id.*

Here, after the jury returned its verdict, the State requested that the trial court order restitution even though “the air-conditioner ha[d] not been replaced [yet].” The amount of the requested restitution was based on Mr. Gregory’s invoice for his inspection and attempted repair of the air-conditioner—\$918.91—and an estimate from Jackson & Sons to replace it—\$6,490. Defendant argues that Mr. Gregory’s invoice was based on repairs to water pipes, a water line, and a water pump and tank. However, according to defendant, the receipt “failed to link the work completed” on the mobile home to the crimes of which defendant was convicted. Furthermore, defendant asserts that there was insufficient evidence to link the invoice with the mobile home because the receipt did not contain the address of the mobile home but, instead, referenced a subdivision in Goldsboro.

Despite these discrepancies, the receipt was consistent with Mr. Gregory’s testimony of the damage he observed at the victim’s home and the necessary repairs. Moreover, contrary to defendant’s assertions, the description of the work performed was related to defendant’s criminal acts of “gutting” the outside unit and cutting the copper piping from underneath the house which, based on Mr. Gregory’s testimony, resulted in breaks in the water lines underneath the mobile home. Ms. Bass’s testimony corroborated this when she testified that she did not notice any water damage in the crawlspace until immediately after the air-conditioner was damaged. Therefore, there was sufficient evidence to support the trial court’s order awarding restitution based on Mr. Gregory’s invoice.

Defendant also contends that there was insufficient evidence to support ordering defendant to pay for an entirely new air-conditioning system because “the proper amount of restitution is the fair market value of the property at the time and place of destruction,” not the cost to replace the property. Moreover, defendant argues that he should not have to pay for replacement of the heat pump because there was

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no evidence that defendant damaged the heat pump, only the air-conditioner. We believe that section 15A-1340.34 should be interpreted to allow a defendant who damages property to be held responsible for all damage directly and proximately caused by the injury to property, including reasonable costs of repair and replacement, especially in a case like this where the air-conditioner was completely inoperable due to defendant's actions. Defendant has provided no case authority prohibiting this interpretation. Furthermore, Mr. Davis testified that the estimate from Jackson & Sons, which was provided to the trial court in support of the restitution award, was for replacing "just . . . the AC." Thus, the amount of the restitution with regard to the replacement cost of the air-conditioner was based on "something more than a guess or conjecture," *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561 (1986), and was supported by evidence at trial.

V. Sentencing

Finally, defendant argues that the trial court erred by sentencing him for both felony larceny and felony possession of stolen goods and that the trial court's order arresting judgment for felony possession of stolen goods did not cure the error. We agree and remand for resentencing.

When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts "are unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant." *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990).

Here, defendant was indicted for and convicted of felony larceny and felonious possession of stolen goods ("felony possession"). After the jury returned its verdict, based on the State's agreement to a mitigated sentence, defendant pled guilty to attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.6. After determining that defendant had a prior record level of IV, the trial court consolidated the offenses for judgment and sentenced him to 77 months to 102 months imprisonment. Under the version of N.C. Gen. Stat. § 14-7.6 that was in effect at the time defendant committed the offenses, defendant was automatically sentenced as a Class C felon.³ Although the State requested a sentence at the high end of the mitigated range, the trial court imposed a sentence in the midpoint

3. The statute was amended for offenses committed after 1 December 2011 and habitual felons are now sentenced at a felony class level four classes higher than the principal felony. See S.L. 2011-192, s.3(d) (2011).

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of the mitigated range. Defendant was sentenced to 77 to 102 months imprisonment. The allowable mitigated sentence for these offenses committed by a defendant with a class IV prior record level ranges from a minimum of 66 to a maximum of 166 months imprisonment.

Later the same day, following the sentencing hearing, likely based on the trial court's recognition that a defendant may be not be convicted of both larceny and possession of stolen property based on the same conduct, *State v. Perry*, 305 N.C. 225, 237, 287 S.E.2d 810, 817 (1982) *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010), the trial court arrested judgment on the felony possession conviction but did not modify defendant's sentence.

Despite the trial court's subsequent order arresting the entry of judgment for felony possession, we are unable to determine whether the trial court gave any weight to that conviction when it sentenced defendant in the middle of the mitigated range instead of at a lower point in that range, especially since the trial court found the mitigating factor that defendant accepted responsibility for his criminal conduct and found no factors in aggravation. Therefore, we must remand this matter back to the trial court for resentencing. *See Moore*, 327 N.C. at 383, 395 S.E.2d at 128. Sentencing within the mitigated range remains within the trial court's discretion.

Conclusion

In sum, we conclude that the trial court did not commit prejudicial error when it overruled defense counsel's objection and refused to strike hearsay testimony. We further conclude that, given the evidence in this case, the trial court did not err in denying defendant's motion to dismiss the charge of injury to real property and did not err in instructing the jury that the air-conditioner was real property. Because the amount of restitution was supported by evidence at trial, the trial court's order of restitution was without error. Finally, because we are unable to determine what weight, if any, the trial court gave to the erroneous entry of judgment on felony possession despite the fact that the trial court later arrested that judgment, we must remand for resentencing.

NO ERROR IN PART; REMANDED FOR RESENTENCING.

Judges BRYANT and DAVIS concur.

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[242 N.C. App. 162 (2015)]

STATE OF NORTH CAROLINA

v.

CALVIN LAVANDER HARRIS, DEFENDANT

No. COA14-1281

Filed 7 July 2015

1. Sentencing—aggravating factor—commission of crime during pre-trial release—due process

Defendant's constitutional right to due process was not violated when the trial court imposed an aggravated sentence for first-degree sexual offense with a child based on the aggravating factor of commission of a crime while on pre-trial release. The N.C. Supreme Court has held this aggravating factor to be constitutional, and the replacement of the Fair Sentencing Act with the Structured Sentencing Act does not affect the applicability of that holding.

2. Sentencing—aggravating factor—commission of crime during pre-trial release—equal protection

Defendant's constitutional right to equal protection was not violated when the trial court imposed an aggravated sentence for first-degree sexual offense with a child based on the aggravating factor of commission of a crime while on pre-trial release. The language of N.C.G.S. § 15A-1340.16 applies to all defendants against whom the State seeks to prove the aggravating factor of committing a crime while on pretrial release.

Appeal by defendant from judgment entered 27 May 2014 by Judge Anderson Cromer in Guilford County Superior Court. Heard in the Court of Appeals 19 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

The assigning of an aggravated sentence to defendant, based upon proper notice and a jury finding that an aggravated factor was present in the instant case, does not violate defendant's right to due process. Where the provisions of N.C. Gen. Stat. § 15A-1340.16 concerning

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aggravating factors during sentencing are applicable to all defendants, there is no violation of a defendant's right to equal protection.

On 7 November 2011, defendant Calvin Lavander Harris was indicted on one count each of first-degree sexual offense and indecent liberties with a child. A superseding indictment for the same two offenses was issued against defendant on 21 April 2014. The charges came on for trial during the 19 May 2014 criminal session of Guilford County Superior Court, the Honorable Anderson Cromer, Judge presiding. During a pre-trial conference, the State elected to proceed only on the first-degree sexual offense charge against defendant. At trial, the State's evidence tended to show the following.

On 11 August 2011, defendant called 911 to report a burglary at his residence where he resided with his girlfriend and her two minor children, three-year-old Sarah and two-year-old James.¹ Upon arriving at the residence, law enforcement officers were told by defendant that someone had broken into the residence and raped Sarah.

Sarah was taken to the hospital where an examination revealed signs of sexual assault. A search of defendant's residence produced no signs of a break-in; to the contrary, police noted undisturbed cobwebs on and around a sliding door through which defendant claimed the burglar had entered. Police found reddish-brown stains on Sarah's bedding and clothes, as well as on the living room sofa and on paper towels and toilet paper found in the kitchen and bathroom trash cans. DNA testing of these stains matched DNA samples collected from defendant and Sarah.

On 23 May, a jury convicted defendant of first-degree sexual offense with a child. The State then presented three aggravating factors to the jury for consideration: that the victim was very young; that defendant committed the offense while on pretrial release on another charge; and/or that defendant took advantage of a position of trust or confidence to commit the offense. In support of the second aggravating factor, the State introduced evidence that defendant had been arrested in February 2011 on a charge of assault with a deadly weapon with intent to kill; the charge was still pending at the time of the instant trial.

The jury found as an aggravating factor that defendant committed the offense while on pretrial release on another charge. The trial court sentenced defendant to an aggravated sentence of 288 to 355 months imprisonment. Defendant appeals.

1. Pseudonyms have been used to protect the identities of the minor children.

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On appeal, defendant raises two issues as to whether his constitutional rights to (I) due process and (II) equal protection were violated when he received an aggravated sentence for committing a crime while on pre-trial release.

I.

[1] Defendant argues that his constitutional right to due process was violated when he received an aggravated sentence for committing a crime while on pre-trial release. We disagree.

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632—33, 669 S.E.2d 290, 294 (2008) (citations and quotation omitted). “[T]he judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality.” *State v. Fowler*, 197 N.C. App. 1, 13, 676 S.E.2d 523, 536 (2009) (quoting *Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993)).

Defendant contends his constitutional right to due process was violated when the trial court submitted defendant’s “pretrial release aggravating factor” because defendant “never received notice of the potential consequence of his pre-trial release.” Defendant’s argument lacks merit. A review of the record shows the State properly and timely notified defendant on 14 March 2014, more than six weeks before trial, of its intent to prove the existence of three aggravating factors against defendant: that the victim was very young, that defendant committed the offense while on pretrial release on another charge, and that defendant took advantage of a position of trust or confidence to commit the offense. See N.C. Gen. Stat. § 15A-1340.16(a6) (2014) (“The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section . . . at least 30 days before trial. . . . The notice shall list all the aggravating factors the State seeks to establish.”). Further, and as acknowledged by defendant, our Supreme Court has held that

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[a]lthough a defendant on pretrial release in an unrelated felony case has not been convicted of the felony and is presumed to be innocent of its commission, he is in a special status with regard to the criminal law. He has not simply been accused of another crime, he has been formally arrested, appeared before a magistrate, and had the conditions of his release pending trial for this crime formally determined. Whether or not one in this position is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, *his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The legislature may constitutionally require that it be considered.* One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance.

State v. Webb, 309 N.C. 549, 559, 308 S.E.2d 252, 258 (1983) (citation omitted) (emphasis added).

Defendant, in acknowledging that *Webb* holds that it is constitutional for a defendant's commission of an offense while on pretrial release for another charge to be used as an aggravating factor in sentencing, nevertheless argues that *Webb* is no longer applicable because *Webb* was decided under the Fair Sentencing Act and defendant's sentence was imposed pursuant to the Structured Sentencing Act. Although defendant is correct that the Fair Sentencing Act under which *Webb* was decided has since been replaced by the Structured Sentencing Act, we disagree with defendant's assertion that the commission of an offense while on pretrial release for another pending charge is unconstitutional for, under both sentencing acts, the consideration of whether a defendant has committed an offense while on pretrial release for another charge as an aggravating factor has remained the same. Compare N.C.G.S. § 15A-1340.4(a) (1981) ("In imposing a prison term, the judge . . . may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence," including the aggravating factor that "defendant committed the crime while on pretrial release on another felony charge[]"), with N.C.G.S. § 15A-1340.16(c) (2014) ("If the jury finds factors in aggravation [including the aggravated factor under N.C.G.S. § 15A-1340.16(d)(12) that "defendant committed the offense while on pretrial release on another charge"], the court shall ensure that

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those findings are entered in the court's determination of sentencing factors form . . ."). Moreover, this Court has already determined that "the Due Process Clauses of our federal and State Constitutions are not offended by the Structured Sentencing Act." *State v. Streeter*, 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001). Accordingly, defendant's argument is overruled.

II.

[2] Defendant next argues that his constitutional right to equal protection was violated when he received an aggravated sentence for committing a crime while on pre-trial release. We disagree.

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws, and require that all persons similarly situated be treated alike.

Our [state] courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis. When evaluating a challenged classification, [t]he court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the [statute] meets the relevant standard of review.

Strict scrutiny applies when a [statute] classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the [S]tate to prove that the [statute] is substantially related to an important government interest. If a [statute] draws any other classification, it receives only rational-basis scrutiny, and the party challenging the [statute] must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the [statute] is valid.

However, [a] statute is not subject to the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment of the United States Constitution or [A]rticle I § 19 of the

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North Carolina Constitution unless it creates a classification between different groups of people.

State v. Fowler, 197 N.C. App. 1, 26–27, 676 S.E.2d 523, 543–44 (2009) (citations and quotations omitted).

Defendant contends his constitutional right to equal protection was violated when he received an aggravated sentence for committing an offense while on pretrial release for another charge. Specifically, defendant argues that, based on the language of *Webb* which describes a defendant who commits an offense while on pretrial release for another charge as having a “special status,” *Webb*, 309 N.C. at 559, 308 S.E.2d at 258, defendant’s equal protection rights have been violated because he received a more severe punishment due to this “special status.” We disagree, as the language of N.C.G.S. § 15A-1340.16 applies to *all* defendants against whom the State seeks to prove the aggravating factor of having committed an offense while on pretrial release for another charge. *See* N.C.G.S. § 15A-1340.16. Further, a review of *Webb* indicates that the use of the phrase “special status” is applicable to any and all defendants who commit an offense while on pretrial release for another charge. *See Webb*, 309 N.C. at 559, 308 S.E.2d at 258. Moreover, an argument similar to defendant’s has already been rejected by this Court in *Streeter*. *See Streeter*, 146 N.C. App. at 559, 553 S.E.2d at 243 (discussing how the use of aggravating and/or mitigating factors during sentencing of a defendant does not constitute a violation of equal protection). Defendant’s argument is, therefore, overruled.

NO ERROR.

Judges STEPHENS and DIETZ concur.

STATE v. HOSKINS

[242 N.C. App. 168 (2015)]

STATE OF NORTH CAROLINA

v.

SHERRI MOONEY HOSKINS, DEFENDANT

No. COA14-1346

Filed: 7 July 2015

1. Appeal and Error—writ of certiorari—not collateral attack—probation extension orders

Defendant's petition for writ of certiorari was not an impermissible collateral attack and was properly before the Court of Appeals. Defendant had no mechanism to appeal her probation extension orders and thus had not waived her right to challenge the probation extension orders.

2. Probation and Parole—probation—improper extension—subject matter jurisdiction

The Buncombe County trial court lacked statutory authority under N.C.G.S. § 15A-1343.2(d) to order a three-year extension more than six months before the expiration of the original period of probation. Additionally, it lacked statutory authority under N.C.G.S. § 15A-1344(d) because defendant's extended period of probation exceeded five years. Thus, the Avery County trial court lacked subject-matter jurisdiction to enter the 2013 orders. The orders were vacated and remanded to the trial court.

Petition for writ of certiorari by defendant from judgments entered on or about 11 July 2013 by Judge Phil Ginn in Superior Court, Avery County. Heard in the Court of Appeals on 6 May 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

STROUD, Judge.

Sherri Mooney Hoskins ("defendant") requests review of orders in which the trial court found defendant in willful violation of her probation, terminated defendant's probation, and converted \$5,715 owed by defendant in restitution into a civil judgment against her. We vacate and remand.

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[242 N.C. App. 168 (2015)]

I. Background

On or about 8 November 2004, a Guilford County grand jury indicted defendant for felony larceny and thirteen counts of obtaining property by false pretenses, offenses alleged to have been committed in 2002. *See* N.C. Gen. Stat. §§ 14-72(a), -100 (2001). On or about 27 June 2005, pursuant to a plea agreement, defendant pled guilty to four counts of obtaining property by false pretenses, and the State dismissed the remaining charges. On or about 27 June 2005, the Guilford County trial court sentenced defendant to four consecutive sentences of six to eight months' imprisonment but suspended the sentences and placed defendant on five years of supervised probation. The Guilford County trial court also ordered that defendant pay \$15,000 in restitution.

Defendant's probation was transferred to Buncombe County. On 16 December 2008, the State alleged that defendant had violated the terms of her probation. On 18 February 2009, the Buncombe County trial court did not find that defendant had violated her probation but ordered a three-year extension of defendant's probation, modifying the termination date of her probation from 27 June 2010 to 27 June 2013.

Defendant's probation was transferred to Avery County. On 19 April 2013, the State again alleged that defendant had violated the terms of her probation. At an 11 July 2013 hearing, defendant moved to dismiss and argued that the 2009 Buncombe County trial court had lacked statutory authority to extend her probation. The Avery County trial court denied defendant's motion. On or about 11 July 2013, the Avery County trial court found defendant in willful violation of her probation, terminated defendant's probation, and converted the remaining \$5,715 owed in restitution into a civil judgment against her. On 22 July 2014, defendant gave timely notice of appeal.

On or about 22 September 2014, defendant filed a petition for writ of certiorari with this Court. On or about 8 October 2014, this Court allowed defendant's petition and issued a writ of certiorari to review the 11 July 2013 orders.

II. Appellate Jurisdiction

[1] We first address the State's argument that the petition for writ of certiorari before this Court is an impermissible collateral attack. The State relies on *State v. Pennell*, 367 N.C. 466, 472, 758 S.E.2d 383, 387 (2014), and *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003). In *Pennell*, our Supreme Court held that "a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order

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revoking his probation and activating his sentence.” *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387. An appeal of this nature is an impermissible collateral attack. *Id.* at 471-72, 758 S.E.2d at 387. In *Rush*, this Court similarly held that the defendant waived her right to challenge a judgment entered on a plea agreement, when she failed to file a motion to withdraw her guilty plea, failed to appeal the judgment, and failed to file a petition for writ of certiorari. *Rush*, 158 N.C. App. at 741, 582 S.E.2d at 39.

But *Pennell* and *Rush* are distinguishable. Defendant is not challenging the trial court’s jurisdiction over her original convictions; rather she contends that the 2009 Buncombe County trial court lacked statutory authority to extend her probation. Unlike an original conviction, a probation extension order is not immediately appealable. *State v. Satanek*, 190 N.C. App. 653, 655, 660 S.E.2d 623, 625 (2008); *see also State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 352-53 (2004). As this Court addressed in *Edgerson*, N.C. Gen. Stat. § 15A-1347 provides the only avenues for appeal from a probation order. *See* N.C. Gen. Stat. § 15A-1347 (2009); *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53. A defendant may only appeal a probation order that either activates his sentence or places the defendant on “special probation.” *See* N.C. Gen. Stat. § 15A-1347; *Satanek*, 190 N.C. App. at 655, 660 S.E.2d at 625; *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53. In extending defendant’s probation, the 2009 Buncombe County trial court neither activated defendant’s sentence nor placed her on “special probation.” *See* N.C. Gen. Stat. §§ 15A-1344(e), -1351(a) (2009). Therefore, like the defendants in *Satanek* and *Edgerson*, defendant here had no mechanism to appeal her probation extension orders. *See id.* § 15A-1347; *Satanek*, 190 N.C. App. at 655, 660 S.E.2d at 625; *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53. Defendant thus has not waived her right to challenge the probation extension orders. *See Satanek*, 190 N.C. App. at 655, 660 S.E.2d at 625; *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53.

The State further contends that defendant’s failure to file a petition for writ of certiorari requesting review of the 2009 orders constitutes a waiver of her right to seek review of those orders. But nothing in *Pennell* or *Rush* suggests that the failure to immediately file a petition for writ of certiorari requesting review of non-appealable, interlocutory orders transforms a petition for writ of certiorari requesting review of subsequent orders, in which a defendant challenges the earlier orders, into an impermissible collateral attack. *See Pennell*, 367 N.C. at 472, 758 S.E.2d at 387; *Rush*, 158 N.C. App. at 741, 582 S.E.2d at 39. Therefore, we hold that this petition for writ of certiorari is properly before us.

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III. Trial Court Jurisdiction

[2] Defendant contends that the 2013 Avery County trial court (1) lacked subject-matter jurisdiction and (2) erred in converting the remaining restitution owed by defendant into a civil judgment. Because we hold that the 2013 Avery County trial court lacked subject-matter jurisdiction, we need not address defendant's second issue. Defendant specifically argues that the 2009 Buncombe County trial court lacked statutory authority to extend defendant's probation more than six months before the termination of the original five-year period of probation.

A. Standard of Review

The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*. It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction. If the court was without authority, its judgment is void and of no effect.

An appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review.

State v. Gorman, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citations, quotation marks, brackets, and ellipsis omitted).

B. Analysis

The maximum duration that a trial court can place a defendant on probation is five years, but the court may grant an extension. N.C. Gen. Stat. § 15A-1343.2(d) (2009).¹ A trial court may order an extension

1. N.C. Gen. Stat. § 15A-1343.2 applies to "persons sentenced under Article 81B of [Chapter 15A of the General Statutes.]" *Id.* § 15A-1343.2(a) (2009). "[Article 81B] applies to criminal offenses in North Carolina, other than impaired driving under G.S. 20-138.1 and failure to comply with control measures under G.S. 130A-25, that occur on or after October 1, 1994. [Article 81B] does not apply to violent habitual felons sentenced under Article 2B of Chapter 14 of the General Statutes." *Id.* § 15A-1340.10 (2005). Because defendant pled guilty to offenses committed in 2002, article 81B applies to defendant.

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beyond this five-year period only in the “last six months of the original period of probation.” *Id.* Additionally, N.C. Gen. Stat. § 15A-1344(d) allows a trial court to extend the period of probation “up to the maximum allowed under G.S. 15A-1342(a)[.]” *Id.* § 15A-1344(d) (2009). N.C. Gen. Stat. § 15A-1342(a) allows for a maximum duration of five years. *Id.* § 15A-1342(a) (2009).

In *Gorman*, the trial court extended a defendant’s probation more than six months before the expiration of the original five-year period of probation. *Gorman*, 221 N.C. App. at 331-32, 727 S.E.2d at 732. This Court held that the trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1343.2(d) to grant such an extension. *Id.* at 334, 727 S.E.2d at 734. This Court further held that the trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1344(d) to grant such an extension, because that provision allows the trial court to extend the period of probation only up to the maximum duration allowed under N.C. Gen. Stat. § 15A-1342(a), which is five years, and the defendant’s extended period of probation exceeded five years. *Id.* at 335, 727 S.E.2d at 734. This Court vacated the extension orders. *Id.*, 727 S.E.2d at 734.

If a trial court lacks the statutory authority to extend a defendant’s probation, we will vacate a subsequent order that derives from the improperly granted extension. *Satanek*, 190 N.C. App. at 656-57, 660 S.E.2d at 625-26. “When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.” *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 324 (2005).

Here, defendant’s original period of probation expired on 27 June 2010. But the Buncombe County trial court extended defendant’s probation on 18 February 2009, approximately sixteen months before this date. Following *Gorman*, we hold that the 2009 Buncombe County trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1343.2(d) to order a three-year extension more than six months before the expiration of the original period of probation. *See Gorman*, 221 N.C. App. at 334, 727 S.E.2d at 734; N.C. Gen. Stat. § 15A-1343.2(d). Additionally, the 2009 Buncombe County trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1344(d), because defendant’s extended period of probation exceeded five years. *See Gorman*, 221 N.C. App. at 335, 727 S.E.2d at 734; *see also* N.C. Gen. Stat. § 15A-1342(a), -1344(d). Because the 2009 Buncombe County trial court lacked statutory authority to extend defendant’s probation, the 2013 Avery County trial court lacked

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subject-matter jurisdiction to enter the 2013 orders. *See Satanek*, 190 N.C. App. at 656-57, 660 S.E.2d at 625-26.

IV. Conclusion

For the foregoing reasons, we hold that the trial court lacked subject-matter jurisdiction to enter the 2013 orders. Accordingly, we vacate those orders and remand the case to the trial court.

VACATED AND REMANDED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
RAHMIL INGRAM, DEFENDANT

No. COA15-22

Filed 7 July 2015

**Constitutional Law—Miranda rights—waiver—voluntariness—
sufficiency of findings of fact—mental condition—police
coercion—totality of circumstances**

The trial court erred in a felony assault with a firearm on a law enforcement officer case by concluding defendant's waiver of *Miranda* rights and statements were involuntarily given. The trial court's order was vacated and remanded for new findings of fact, and, if needed, a new hearing. The issues of defendant's mental condition and police coercion must be considered by the totality of the circumstances analysis.

Judge Steelman concurred in this opinion prior to 30 June 2015.

Appeal by State from order entered 15 October 2014 by Judge G. Bryan Collins, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellee.

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HUNTER, JR., Robert N., Judge.

The State appeals from a pretrial order suppressing Rahmil Ingram's ("Defendant") statements made to police after waiver of his *Miranda* rights. Because the trial court failed to resolve material conflicts in the evidence presented at the suppression hearing, we vacate and remand with instructions to make additional findings of fact to resolve these issues.

I. Factual & Procedural History

On 20 February 2012, a Durham County Grand Jury indicted Defendant for two counts of felony assault with a firearm on a law enforcement officer. The indictments read as follows:

[D]efendant . . . unlawfully, willfully, and feloniously did assault . . . a law enforcement officer . . . with a firearm, to wit: the defendant brandished a shotgun and pointed the same at the law enforcement officer just described. At the time of this offense, that law enforcement officer was performing a duty of that office, to wit: . . . executing service of a lawfully issued search warrant at the address of 905 Colfax Street, Apartment A, Durham, North Carolina.

On 2 September 2014, Defendant filed a pretrial motion to suppress statements he made to law enforcement officers at Duke Hospital's emergency room moments before undergoing surgery to treat his bullet wounds.

In his affidavit supporting his motion to suppress, Defendant contends he was shot twice by police officers of Durham Police Department's Selective Enforcement Team ("SET"), after they broke down the front door of his family's residence by use of a battering ram and entered using four flash-bang devices. Defendant contends he was asleep in his bedroom when he heard a window bust and a "commotion" that he thought was someone breaking into his home to rob his family. Defendant grabbed his loaded shotgun and turned the corner into the hallway, where he immediately saw two police officers dressed in SWAT gear advance toward him. Defendant alleged that as soon as he realized the men were police officers, he dropped his shotgun and put his hands up. One officer shot Defendant in the back of the arm, which knocked Defendant to the ground. Defendant alleged the officers kept shooting and, of the four shots Defendant heard while he was on the ground with his legs up, one bullet entered through his backside. After he was shot, Defendant stated four SET officers continued past him to the bedrooms in the back of the house. Defendant was then handcuffed and moved to

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the front of the residence, where he was treated by a medic. Durham County EMS and Officer L.M. Kirkman (“Officer Kirkman”) of the Durham Police Department transported Defendant to Duke Hospital for further treatment. Following several requests from medical personnel to remove Defendant’s handcuffs, Officer Kirkman removed the handcuffs six minutes into his medical treatment. Officer J.J. Wilking (“Officer Wilking”) of the Durham Police Department arrived at Duke Hospital at approximately 10:50 a.m. to take custody of Defendant.

According to the nurse’s note attached to Defendant’s affidavit, Defendant was given three doses intravenously of 50 micrograms of Fentanyl, a strong narcotic medication indicated for severe pain, at 10:55 a.m., 11:05 a.m., and 12:15 p.m. At 2:15 p.m., Defendant was “alternat[ing] between crying loudly and yelling,” and at that time, a prescription for Dilaudid, another strong narcotic pain medication, was ordered but not given to Defendant. The nurse’s note states: “[w]ill give medication to [patient] after [North Carolina State Bureau of Investigation (“SBI”)] interview per police request. [Doctor] informed.”

At approximately 2:37 p.m., an SBI agent interviewed Defendant about the shootings. Officer Wilking was present for some of the interview. Defendant was unable to sign the form indicating he waived his *Miranda* rights but wrote his initials in wavy letters. At 2:47 p.m., the interview ended, as medical staff intervened to transport Defendant to the operating room for a procedure requiring general anesthesia. Defendant was administered Dilaudid at approximately 3:08 p.m., and his operation started at approximately 3:40 p.m.

Defendant alleged that he waived his *Miranda* rights and made statements to law enforcement when he was “in a great deal of pain because of his gunshot wounds” and “under the influence of several doses of serious pain medication[;]” therefore, he argues, his waiver was not voluntary and his statements were not reliable. Furthermore, Defendant alleged his statements were involuntary, because they were coerced by police who ordered medical personnel to withhold pain medication from him. Defendant’s motion to suppress was heard at the 24 September 2014 Criminal Session of Durham County Superior Court before the Honorable G. Bryan Collins, Jr. The transcript of the suppression hearing reveals the following pertinent facts.

At approximately 2:30 p.m. on 24 January 2012, SBI Agent Brian Fleming (“Agent Fleming”) arrived at Duke Hospital’s emergency department to interview Defendant about the shootings. Agent Fleming testified he spoke with a nurse or doctor who confirmed Defendant was in

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a position to speak with him. Agent Fleming entered Defendant's room, where Officer Wilking was attending for the purpose of arresting and charging Defendant upon release from the hospital.

Agent Fleming testified he advised Defendant of his *Miranda* rights and that Defendant "said he understood." Agent Fleming asked Defendant "if he was willing to speak with [him] now in light of those rights, [and] if he would sign the [*Miranda* rights waiver] form." The record indicates Defendant initialed the *Miranda* form at 2:38 p.m. Agent Fleming testified Defendant was unable to sign, because "he had been shot in the shoulder and that the pain made it hard for him to write. . . . So he just initialed the form." Agent Fleming testified that Defendant seemed to be "[i]n some pain" but appeared "calm[] and spoke plainly[] and coherently[]" during the nine-minute interview he conducted about the circumstances surrounding the shootings earlier that day. Agent Fleming wrote Defendant's statements in a police report.¹

According to Agent Fleming's testimony, Defendant stated at the emergency room that he awoke that morning to what he thought was someone breaking into his home to rob his family. Defendant grabbed his 12-gauge shotgun and started toward the "commotion." As he turned into the hallway, he saw police officers dressed in SWAT gear. Defendant stated he immediately "threw the gun down and then he was shot." Agent Fleming "took that to be [sic] [Defendant] was implying that some time had elapsed." Agent Fleming "kept asking clarification questions to try to pin down exactly . . . what [Defendant] did and what [the SET officers] did." Agent Fleming then testified Defendant at one point stated: "By the time I threw the gun, I was getting shot." Agent Fleming understood this statement to mean no time elapsed between when Defendant threw his gun and when he was shot. At approximately 2:47 p.m., medical personnel intervened and asked Agent Fleming to leave, so they could transport Defendant to the operating room. During cross-examination, Agent Fleming testified that he did not know what medications were administered to or prescribed for Defendant prior to interviewing him.

Officer Greg Silla ("Officer Silla") of the Durham Police Department testified that he arrived at Duke Hospital around 2:40 p.m. to relieve Officer Wilking. Officer Silla's assignment similarly was to "stand by [Defendant] and when he was to be released, to notify [his] command and take him to jail." After taking command, Officer Silla testified he saw Defendant laying in a stretcher in his room with "[m]edical staff . . .

1. The police report was not included in the record on appeal.

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around him[,] so [Officer Silla] stood outside [of] the room.” When medical staff transported Defendant to the operating room, Officer Silla followed closely behind. Defendant saw him and asked him “what [he was] doing there.” Officer Silla responded: “When you’re done here, you’re going to jail.” Defendant stated: “[I]f [I] knew that, [I] would have shot that cop.” Officer Silla testified that this short exchange was the only interaction he had with Defendant. On cross-examination, Officer Silla testified that he did not know what medications were administered to or prescribed for Defendant.

Defendant presented testimony of Dr. Christena Roberts, a forensic pathologist, who had reviewed approximately 200 pages of Defendant’s medical records associated with his hospital visit on 24 January 2012. Dr. Roberts referred to a medication sheet in relaying the timing and dosage of pain medications given to Defendant. Dr. Roberts testified that, according to the medication sheet, Defendant was administered intravenously three doses of 50 micrograms of Fentanyl within an hour and nineteen minutes prior to his custodial interview with law enforcement. Dr. Roberts explained the effects of Fentanyl as follows: “in addition to pain relief, as many of the other strong narcotics, you also get some respiratory depression and you also get sedation. And then specifically with [F]entanyl, you also may get confusion.” The three intravenously administered Fentanyl doses, doses indicated for “severe pain,” were administered at 10:56 a.m., 11:05 a.m., and 12:15 p.m. Dr. Roberts testified a narcotic medication at this dosage would only be given in such a quick succession if “it wasn’t providing adequate pain relief, and that’s supported by the notes[.]” Dr. Roberts stated that another narcotic pain medication, Dilaudid, was written next on Defendant’s medication sheet, but the time when it was administered was not listed, so she looked to the nurses’ notes to find more information.

Referring to a nurse’s note, Dr. Roberts testified: “‘At 2:15 Dilaudid was prescribed for pain.’ [The note] said, ‘That the patient was crying loudly and yelling,’ and so the doctor had prescribed the Dilaudid. The note continued to say that the medication was being held at the request of police until the SBI interview.” The State objected to this testimony on hearsay grounds, which the trial court overruled. Defendant then submitted into evidence the nurse’s note to which Dr. Roberts referred. The State objected again on hearsay grounds and the trial court overruled the objection after confirming Dr. Roberts relied upon the nurse’s note in forming her opinion. The trial court admitted the nurse’s note into evidence. Dr. Roberts was then asked by defense counsel: “And from your review of [Defendant’s] medical records, was pain medication withheld

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at the request of the police?” She responded: “Yes. According to this handwritten nurse’s note.”

After the presentation of evidence, the parties made their arguments and then the trial judge made findings of fact, conclusions of law, and orally granted Defendant’s motion to suppress. The trial court’s 15 October 2014 written order suppressing Defendant’s statements lists the following pertinent facts.

On 24 January 2012, two police officers shot Defendant. Defendant was rushed to Duke Hospital. Officer Wilking arrived for the purpose of arresting and charging Defendant upon release from the hospital. While at the emergency department, Defendant was administered intravenously three doses of 50 micrograms of Fentanyl, a narcotic medication, for pain relief. These doses were administered at 10:56 a.m., 11:05 a.m., and 12:15 p.m. At approximately 2:15 p.m., Defendant was alternating between crying and yelling, and another narcotic, Dilaudid, was ordered but not given to Defendant at that time.

Agent Fleming arrived at Duke Hospital to investigate the shootings. Agent Fleming spoke with a doctor or nurse, who advised him that he could interview Defendant. At approximately 2:38 p.m., Agent Fleming read Defendant his *Miranda* rights. Defendant was unable to sign the form due to the bullet wound in his shoulder but indicated he understood by initialing a *Miranda* waiver. Defendant then made a statement to Agent Fleming.

At approximately 2:40 p.m., Officer Silla arrived to relieve Officer Wilking and was assigned to attend to Defendant. At approximately 2:47 p.m., Agent Fleming left Defendant’s room at the request of medical personnel, who needed to transport Defendant to the operating room. Officer Silla followed as Defendant was wheeled to the operating room, and Defendant made a statement to Officer Silla not in response to questioning.

The trial judge further found as fact that “[d]uring all times relevant to this suppression issue, the Defendant was in severe pain and under the influence of strong narcotic medication[;]” that Agent Fleming and Officer Silla had no knowledge of the medications given to Defendant; and that at the time of his statements, Defendant still had not been administered the prescribed Dilaudid for pain relief. Excluded from the trial court’s findings of fact, however, was a resolution as to whether pain medication was ordered by law enforcement to be withheld until after the custodial interview with Agent Fleming. Also omitted were findings as to Defendant’s ability to waive his rights and his degree of impairment.

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Based upon the foregoing findings of fact, the trial judge made the following conclusions of law:

1. During all times relevant to this suppression issue, the Defendant was in custody for Miranda purposes.
2. The State failed to prove by a preponderance of the evidence that the Defendant's Miranda waiver was voluntary, based on the Court's finding that the Defendant was in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication.
3. The Defendant made his statement to [Agent Fleming] while the Defendant was in custody and without a valid waiver of his Miranda rights.
4. Regarding the Defendant's statement to Office Silla, the State failed to prove by a preponderance of the evidence that the Defendant's statement was voluntary, based on the Court's finding that the Defendant was in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication.
5. Considering the totality of the circumstances, it cannot be said that either statement was the product of the Defendant's free and rational choice.
6. Because both of the Defendant's statements were involuntary, and because the Defendant's waiver of his Miranda rights before his statement to [Agent Fleming] was involuntary, his rights to due process under the United States and North Carolina Constitutions were violated.

The trial judge then ordered any statements made by Defendant at the hospital, and any evidence derived therefrom, be suppressed and deemed inadmissible at trial. The State appeals.

II. Analysis

The State contends the trial court erred in concluding Defendant's waiver of *Miranda* rights and statements were involuntarily given. Specifically, the State contends that there is insufficient evidence to support the trial court's findings of fact and that the trial court's findings of fact do not support its conclusions of law. For the following reasons, we vacate the trial court's order and remand for new findings of fact, and, if needed, a new hearing.

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A. Standard of Review

“Where a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a *voir dire* hearing to ascertain whether defendant has been informed of their constitutional rights and has knowingly, voluntarily, and intelligently waived these rights before making the challenged admissions.” *State v. Strobel*, 164 N.C. App. 310, 313, 596 S.E.2d 249, 252 (2004) (citing *State v. Jenkins*, 300 N.C. 578, 584, 268 S.E.2d 458, 463 (1980)).

Our review of a trial court’s decision on a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “Appellate courts are bound by the trial court’s findings if there is *some* evidence to support them, and may not substitute their own judgment for that of the trial court even when there is evidence which could sustain findings to the contrary.” *State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 829 (2009) (emphasis added) (citing *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984)). “[A]n appellate court accords great deference to the trial court in this respect[.]” *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619-20.

However, “[w]hen the *voir dire* evidence is conflicting, as here, the trial judge must weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact.” *Jenkins*, 300 N.C. at 584, 268 S.E.2d at 463. Furthermore, “when the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court.” *State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (citing *State v. McKinney*, 361 N.C. 53, 63-65, 637 S.E.2d 868, 875-76 (2006)). In such a situation,

[r]emand is necessary because it is the trial court that “is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.”

Id. at 124, 729 S.E.2d at 67 (quoting *Cooke*, 306 N.C. at 134, 291 S.E.2d at 620).

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B. Trial Court's Findings of Fact

The State contends “[t]here were several errors in the trial court’s findings of fact, including the court’s improperly considering evidence that could not be considered for its truth as substantive evidence, making facts unsupported by competent evidence, and failing to resolve other relevant evidence.”

1. Trial Court Improperly Considering Evidence

First, the State argues the trial judge improperly considered hearsay evidence. This challenge is relevant as to the admissibility into evidence of the nurse’s note for a jury to consider, but it is irrelevant as to whether it may be considered by the trial court conducting a *voir dire* hearing on a preliminary motion to suppress. See *In re Will of Leonard*, 82 N.C. App. 646, 648, 347 S.E.2d 478, 479-80 (1986) (dismissing challenge to trial judge’s consideration of court records as hearsay and, *inter alia*, not properly authenticated or received into evidence, on the grounds the judge considered the evidence in a *voir dire* examination to determine a witness’ competency). Therefore, we dismiss this challenge.

2. Findings of Fact Unsupported by Competent Evidence

Second, the State argues the trial court’s findings of fact were unsupported by competent evidence. Specifically, the State challenges findings of fact nos. 14, 15, 18, 19, and 20, which state:

14. During all times relevant to this suppression issue, the Defendant was in severe pain and under the influence of strong narcotic medication.

15. The Defendant was given 50 micrograms of Fentanyl at 10:56 a.m. by IV.

....

18. The Defendant received another dose of 50 micrograms of Fentanyl at 11:05 a.m., and a third dose of 50 micrograms of Fentanyl at 12:15 p.m.

19. The Defendant received a total of three doses of 50 micrograms each of Fentanyl within one hour and 19 minutes.

20. At 2:15 p.m., 23 minutes before [Agent] Fleming began his interview with the Defendant, the Defendant was alternating between crying and yelling, and the narcotic

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Dilaudid was ordered. At the time of the interview and at the time of the statement to Officer Silla, the Dilaudid had not been administered to the Defendant.

The State contends “the trial court erred in admitting ‘nurses’ notes’ for the truth of the matter contained within, and making substantive findings on that evidence.” We note that Rules 104(a) and 1101(b)(1) of the North Carolina Evidence Code state explicitly the rules of evidence do not apply in suppression hearings. Therefore, the State’s argument is without merit.

Trial judges must decide “[p]reliminary questions concerning . . . the admissibility of evidence[.]” N.C. Gen. Stat. § 8C-1, Rule 104 (2014). When making such a determination, a trial judge “is not bound by the rules of evidence[.]” *Id.* In interpreting Rule 104, this Court has explained: “The Rule’s plain meaning, the Commentary to the Rule, and sound judgment all contemplate that, in deciding preliminary matters, the trial court will consider any relevant and reliable information that comes to its attention, whether or not that information is technically admissible under the rules of evidence.” *In re Will of Leonard*, 82 N.C. App. at 648, 347 S.E.2d at 480. This is because in deciding a preliminary question such as whether evidence is admissible, “the trial court is not acting as the trier of fact. Rather, it is deciding a threshold question of law, which lies mainly, if not entirely, within the trial judge’s discretion.” *Id.*

That trial judges are not bound in certain proceedings to the formal rules of evidence is reiterated in Rule 1101(b), which provides: “The rules other than those with respect to privileges do not apply in the following situations: . . . Preliminary Questions of Fact—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).” N.C. Gen. Stat. § 8C-1, Rule 1101(b)(1) (2014). Accordingly, the State’s argument that a trial judge during a suppression hearing is unable to rely upon evidence in making its findings of fact because it might be considered hearsay at trial necessarily fails. This conclusion is bolstered by recent decisions of our Supreme Court.

In *State v. Murchison*, our Supreme Court relied on Rule 1101(b) in holding that because the trial court was not bound by the formal rules of evidence in a probation revocation hearing, it acted within its discretion when it admitted hearsay evidence that would have been inadmissible at trial and relied solely thereupon in support of its decision to revoke the defendant’s probation. 367 N.C. 461, 464-65, 758 S.E.2d 356, 358-59 (2014). In reaching this decision, the Court in *Murchison* noted that

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“[o]ur precedent applying Rule of Evidence 1101(b)(3) to sentencing proceedings is instructive.” *Id.* at 464, 758 S.E.2d at 358. Our Supreme Court cited its decision in *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), *cert. denied*, 539 U.S. 949, 156 L.E.2d. 640 (2003), wherein the Court determined “the Rules of Evidence do not apply in capital sentencing proceedings[,]” and concluded it was not error for a trial court to allow a jury to consider and find an aggravating factor that was based solely on inadmissible hearsay. *Id.* at 547, 573 S.E.2d at 913. Additionally, our Supreme Court in *Carroll* reasoned that the hearsay evidence was “‘reliable evidence relevant to the State’s duty to prove its aggravating circumstances’ and was properly admitted.” *Murchison*, 367 N.C. at 464-65, 758 S.E.2d at 358 (quoting *Carroll*, 356 N.C. at 547, 573 S.E.2d at 913).

In addition, our Supreme Court in *State v. Thomas* permitted the admission of hearsay evidence to prove an aggravating factor in a sentencing proceeding, citing Rule of Evidence 1101(b)(3) and concluding as follows: “We have repeatedly stated that the Rules of Evidence do not apply in capital sentencing proceedings. Therefore, a trial court has great discretion to admit any evidence relevant to sentencing.” 350 N.C. 315, 359, 514 S.E.2d 486, 513, *cert. denied*, 528 U.S. 1006, 145 L.Ed.2d 388 (1999). We find instructive the reasoning of our Supreme Court in permitting the trial court during sentencing and probation proceedings to admit and rely solely upon evidence which would be inadmissible at trial because the Rules of Evidence do not apply.

Here, as in *Carroll*, *Thomas*, and *Murchison*, we believe the trial court had “great discretion to admit any evidence relevant to” the suppression hearing. *See Murchison*, 367 N.C. at 465, 758 S.E.2d at 358. The trial court appropriately exercised its discretion when it admitted the nurse’s note as substantive evidence underlying its findings of fact. This hearsay evidence was reliable and relevant to determining whether Defendant had voluntarily waived his *Miranda* rights and made statements to law enforcement officers. As “the proceeding was a [suppression hearing], the trial court was not bound by the formal rules of evidence and acted within its discretion when it admitted the hearsay evidence.” *Murchison*, 367 N.C. at 465, 758 S.E.2d at 359; Rule 1101(b) (1). Furthermore, we find applicable the following passage on the reliability of hospital records:

There is good reason to treat a hospital record entry as trustworthy. Human life will often depend on the accuracy of the entry, and it is reasonable to presume that a hospital is staffed with personnel who competently perform their day-to-day tasks. To this extent at least, hospital records

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are deserving of a presumption of accuracy even more than other types of business entries.

Hedrick v. Southland Corp., 41 N.C. App. 431, 436, 255 S.E.2d 198, 202 (1979) (quoting *Thomas v. Hogan*, 308 F.2d 355, 361 (4th Cir. 1962)). We conclude the trial judge did not abuse his discretion in admitting the nurse's note and making substantive findings solely thereupon and, therefore, we dismiss the State's argument on this issue.

3. Failure to Resolve Conflicting Evidence

Third, the State argues the trial court failed to resolve evidentiary issues before it in reaching its conclusions of law, particularly in failing to address circumstances surrounding Defendant's *Miranda* waiver and statements, such as the officers' testimony as to Defendant's "condition, demeanor, interaction, understanding, awareness, consciousness, etc." We agree the trial court failed to resolve issues that arose from the evidence presented at the suppression hearing.

We review *de novo* a trial court's conclusions as to the voluntariness of a defendant's waiver of *Miranda* rights and statements. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). "The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." *State v. Knight*, 340 N.C. 531, 550, 459 S.E.2d 481, 493 (1995). Where, as here, "a defendant's waiver of *Miranda* rights arises under the same circumstances as the making of his statement, the voluntariness issues may be evaluated as a single matter." *State v. Ortez*, 178 N.C. App. 236, 244, 631 S.E.2d 188, 195 (2006) (citation omitted), *disc. review denied*, 361 N.C. 434, 649 S.E.2d 642 (2007). Whether a waiver and statements were voluntarily made "must be found from a consideration of the entire record[.]" *State v. Pruitt*, 286 N.C. 442, 454, 212 S.E.2d 92, 100 (1975). "[T]he reviewing court applies a totality-of-circumstances test." *State v. Wilkerson*, 363 N.C. 382, 431, 683 S.E.2d 174, 204 (2009).

Involuntariness may be found when "circumstances precluding understanding or the free exercise of will were present." *State v. Allen*, 322 N.C. 176, 186, 367 S.E.2d 626, 631 (1988). "[I]ntoxication is a circumstance critical to the issue of voluntariness[.]" *State v. McKoy*, 323 N.C. 1, 22, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L.Ed.2d 369 (1990). When intoxication is the only factor in the analysis supporting a determination of involuntariness, "[a]n inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Phillips*, 365

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N.C. 103, 114, 711 S.E.2d 122, 133 (2011) (quoting *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981) (citations omitted)). However, intoxication “is simply [one] factor to be considered in determining voluntariness.” *McKoy*, 323 N.C. at 22, 372 S.E.2d at 23. There are a number of other relevant factors:

whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hyde, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000) (quoting *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (citation omitted)). In addition, “age is also to be considered by the trial judge in ruling upon the admissibility of a defendant’s confession[.]” *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983). Furthermore, for a waiver of *Miranda* rights to be valid, it “must be . . . given voluntarily ‘in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]’” *Wilkerson*, 363 N.C. at 430-31, 683 S.E.2d at 203-04 (2009) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 89 L.Ed.2d 410, 421 (1986)). “[W]here it appears that an incriminating statement was given under any circumstances indicating coercion or involuntary action, that statement will be inadmissible.” *Strobel*, 164 N.C. App. at 317, 596 S.E.2d at 255 (citing *State v. Steptoe*, 296 N.C. 711, 716, 252 S.E.2d 707, 710 (1979)). “[T]he question of whether Defendant’s incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him.” *State v. Flood*, __ N.C. App. __, __, 765 S.E.2d 65, 70 (2014) (citation omitted).

Here, the trial court suppressed Defendant’s statements on the grounds Defendant was “in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication[;]” however, the trial court failed to make any specific findings as to Defendant’s mental condition, understanding, or coherence—relevant considerations in a voluntariness analysis—at the time his *Miranda* rights were waived and his statements were made. The trial court found only that Defendant was in severe pain and under the influence of several narcotic pain medications. These factors are not all the trial court

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should consider in determining whether his waiver of rights and statements were made voluntarily.

Furthermore, Defendant moved to suppress his statements on the grounds that his statements were involuntary due to his being under the influence of strong narcotic medication, his being in severe pain, and police officers allegedly coercing his *Miranda* waiver and statements by withholding pain medication. The trial court failed to resolve the material conflict in evidence as to whether police coercion occurred, which is a material consideration in a voluntary analysis and bolsters our conclusion that remand is required at this stage of the proceedings.

During the suppression hearing, Dr. Roberts testified that the nurses' notes indicated medical personnel were ordered by law enforcement to withhold pain medication from Defendant until after the interview with Agent Fleming. The nurse's note, admitted into evidence and part of the record on appeal, states unambiguously that at 2:15 p.m.: "[Defendant] [a]lternates between crying loudly and yelling. Orders for Dilaudid given. Will give medication to [patient] after SBI interview per police request. [Doctor] informed." Agent Fleming and Officer Silla both testified that they neither requested, nor were they aware of any request by law enforcement, that pain medication ordered for Defendant be withheld until after his custodial interrogation.

We believe that remand to the trial court for further fact finding and a reconsideration of the evidence in light of the totality of the circumstances is the most appropriate remedy at this stage of the proceedings. As guidance on remand, we recommend the trial court reconsider the evidence and make further findings, where appropriate, on the "circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him." *Flood*, __ N.C. App. at __, 765 S.E.2d at 70 (citation omitted).

Upon remand, the trial court may find the evidence does not show any deliberate attempt by law enforcement to withhold pain medication from Defendant to coerce a confession. Nonetheless, the nurse's note supports alternative inferences. The State was on notice of this evidence as a result of Defendant's motion to suppress. Officer Wilking, who according to the hospital records requested that pain medication not be given to Defendant, was not called as a witness by either the State or Defendant. The State argues on appeal: "There was also no evidence of any coercion, or any evidence [Agent] Fleming (or his presence) prevented any attempt by Duke personnel to administer any type of medical treatment or procedure, or give any medication, let alone any threat to

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withhold treatment if defendant did not speak with Fleming.” This argument is incomplete and could be misleading. The order fails to resolve the issues raised by the State of Defendant’s condition after taking these medications and the issue of potential police misconduct.

“[E]xclusionary rules are very much aimed at deterring lawless conduct by police and prosecution[.]” *Lego v. Twomey*, 404 U.S. 477, 489, 30 L.E.2d 618, 627 (1972); *see also Colorado v. Connelly*, 479 U.S. 157, 166, 93 L.Ed.2d 473, 484 (1986) (“The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution.”). It is essential that law enforcement be able to procure waivers of *Miranda* rights and incriminating statements voluntarily; however, restraints on law enforcement are required to protect a criminal suspect’s constitutional guarantees, such as the exclusion of involuntary statements at trial. *See, e.g., State v. Bordeaux*, 207 N.C. App. 645, 656, 701 S.E.2d 272, 279 (2010) (citation omitted).

Because police coercion is a factor that ought to be considered and resolved in a totality-of-the-circumstances analysis on these facts, we conclude the trial court’s order does not contain sufficient findings of fact at this stage of the proceedings to which this Court can properly apply the voluntariness standard. Furthermore, the order fails to resolve the issues of Defendant’s condition after being administered these medications. Accordingly, the absence of the resolution of conflicting material evidence and the absence of further findings of fact necessary to conduct a meaningful review of the trial court’s order requires that we remand this case to the trial court for a reconsideration of the evidence, an entry of an order that contains appropriate findings, and, if the trial court in its discretion deems it necessary, for another suppression hearing. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 67 (“[W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court.”); *State v. Booker*, 306 N.C. 302, 312-13, 293 S.E.2d 78, 84 (1982) (“The court’s failure to find facts resolving the conflicting voir dire testimony was prejudicial error requiring remand to the superior court for proper findings and a determination upon such findings of whether the inculpatory statement made to police officers by defendant during his custodial interrogation was voluntarily and understandingly made.”); *see also State v. O’Connor*, 222 N.C. App. 235, 243-44, 730 S.E.2d 248, 253-54 (2012) (remanding where trial court failed to resolve material conflicts in evidence presented at suppression hearing as to whether the police had reasonable suspicion to stop the defendant’s vehicle); *State v. Neal*, 210 N.C. App. 645, 656, 709 S.E.2d 463, 470 (2011)

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(remanding where trial court failed to resolve material evidentiary conflicts during suppression hearing as to whether officer promised to drop a trespass charge in exchange for a defendant's consent to search); *State v. Ghaffar*, 93 N.C. App. 281, 289, 377 S.E.2d 818, 823 (1989) (remanding for new suppression hearing where trial court failed to resolve conflicting evidence as to whether the defendant gave police consent to search his vehicle).

III. Conclusion

In summary, we agree with part of the State's argument on appeal and are not satisfied the trial judge's findings of fact are complete. Because the issues of Defendant's mental condition and police coercion must be considered in this totality-of-the-circumstances analysis, we remand this matter to the trial court to make such additional findings of fact not inconsistent with this opinion and, if necessary, to conduct a new hearing on Defendant's motion to hear additional evidence.

VACATED AND REMANDED.

Judges STEELMAN and DAVIS concur.

Judge Steelman concurred in this opinion prior to 30 June 2015.

STATE OF NORTH CAROLINA
v.
RICHARD DARNELL JAMES

No. COA15-21

Filed 7 July 2015

1. Indictment and Information—change of address as a sex offender—not reported in three days—“business” omitted—indictment sufficient

A superseding indictment for failing to report a change of address as a sex offender was not fatally flawed where it alleged that defendant did not report his change of address within three days rather than three business days. The superseding indictment gave defendant sufficient notice of the charge against him. Moreover, he did not argue that he was in any way prejudiced in preparing his defense by the omission of the word “business.”

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2. Appeal and Error—preservation of issues—issue not raised at trial

Defendant did not preserve for appellate review an issue involving his motion to dismiss for insufficient evidence where his motions to dismiss at trial involved the sufficiency of the indictment and not the argument that he raised on appeal.

3. Constitutional Law—effective assistance of counsel—failure to raise issue at trial—no prejudice

A defendant charged with not registering a change of address as a sex offender received effective assistance of counsel where his attorney did not preserve for appellate review the issue of the sufficiency of the evidence. Even if the issue had been preserved on those grounds, the evidence presented by the State was sufficient to raise the question of guilt for the jury.

Judge HUNTER, Jr. dissenting.

Appeal by defendant from judgments entered 26 August 2014 by Judge Claire V. Hill in Johnston County Superior Court. Heard in the Court of Appeals 3 June 2015.

Roy Cooper, Attorney General, by Kevin G. Mahoney, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

DAVIS, Judge.

Richard Darnell James (“Defendant”) appeals from his convictions for failure to report a change of address as a sex offender and attaining the status of an habitual felon. On appeal, he contends that (1) his indictment was fatally flawed; (2) the trial court erred in denying his motion to dismiss; and (3) he received ineffective assistance of counsel. After careful review, we conclude that Defendant received a fair trial free from error and dismiss his appeal in part.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 10 September 2001, Defendant was convicted of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1. As a result of this conviction, Defendant was required to register as a

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sex offender pursuant to N.C. Gen. Stat. § 14-208.7(a) with the sheriff of his county of residence. On 8 July 2013, Defendant notified the Johnston County Sheriff's Office of his change of address from 3521 Old School Road, Four Oaks, North Carolina to 2133 Mamie Road, Four Oaks, North Carolina.

On 29 November 2013, Defendant was discovered living in a vacant rental house located at a third address — 2871 Old School Road. On that date, the owner of the rental house, Leroy Baker ("Baker"), and his son-in-law, Jesse Lee ("Lee"), had gone to the 2871 Old School Road address to check on the property after receiving an abnormally high electrical bill for the home. Upon entering the house, they discovered Defendant, whom neither of them knew or had ever seen before. Defendant told them that "he had just got out of jail and had no place to go" and that "he had been staying there." He further stated that he had been living there "about a month" since "he got out of jail the 30th of October." Baker and Lee ordered Defendant to leave. After Defendant left the residence, Lee discovered an identification card with Defendant's name on it. Lee subsequently contacted the Johnston County Sheriff's Office and informed officers of Defendant's unlawful entry into the rental home.

Captain Chris Strickland ("Captain Strickland") of the Johnston County Sheriff's Office, who oversaw the sex offender registry, reviewed the break-in report naming Defendant as the perpetrator of the offense. Recognizing Defendant as a convicted sex offender, Captain Strickland dispatched Lieutenant Gary Bridges ("Lieutenant Bridges") to Defendant's last reported address, 2133 Mamie Road, to investigate whether Defendant was, in fact, living there.

Upon arriving at a residence located at the 2133 Mamie Road address, Lieutenant Bridges encountered two individuals, Clinton Smith ("Smith") and Janet Mauney ("Mauney"). They informed Lieutenant Bridges that they had been living at that address for nine years and fourteen years, respectively, and that Defendant had never lived there.

On 3 February 2014, Defendant was indicted on the charge of failure to report a change of address as a sex offender in violation of N.C. Gen. Stat. § 14-208.11(a)(2) and having attained the status of an habitual felon. On 21 July 2014, a superseding indictment was issued for the former charge. A jury trial was held in Johnston County Superior Court on 25 August 2014 before the Honorable Claire V. Hill. Defendant moved to dismiss the charges against him at the close of the State's evidence and at the close of all the evidence. The trial court denied both of his motions.

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On 26 August 2014, the jury found Defendant guilty of both charges. Defendant was sentenced to 90-120 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis**I. Sufficiency of Indictment**

[1] Defendant first argues that the trial court lacked jurisdiction to enter judgment against him on the ground that the superseding indictment failed to allege all of the essential elements of the offense of failure to report a change of address as a sex offender, thereby requiring that his convictions be vacated. We disagree.

It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. The purpose of the indictment is to give a defendant reasonable notice of the charge against him so that he may prepare for trial. A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated.

State v. Campbell, __ N.C. __, __, __ S.E.2d __, __, slip op. at 5 (filed June 11, 2015) (internal citations and quotation marks omitted). This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

The Supreme Court has also stated the following regarding the legal requirements applicable to indictments:

[W]e note that the “true and safe rule” for prosecutors in drawing indictments is to follow strictly the precise wording of the statute because a departure therefrom unnecessarily raises doubt as to the sufficiency of the allegations to vest the trial court with jurisdiction to try the offense. Nevertheless, it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime. . . . [A]n indictment shall not be quashed by reason of any informality or refinement if it accurately expresses the criminal charge in plain,

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intelligible, and explicit language sufficient to permit the court to render judgment upon conviction. . . . [I]t would not favor justice to allow defendant to escape merited punishment upon a minor matter of form.

State v. Sturdivant, 304 N.C. 293, 310-11, 283 S.E.2d 719, 731 (1981) (internal citations and quotation marks omitted); *see also State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (“[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.” (citation and quotation marks omitted)).

As we stated in *Harris*, the mere fact that an indictment departs in some way from the strict statutory language is not determinative of the indictment’s sufficiency. *See Harris*, 219 N.C. App. at 592-93, 724 S.E.2d at 636 (“The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” (citation and quotation marks omitted)).

With regard to the offense of failure to report a change of address as a sex offender, we have noted that “because N.C.G.S. §§ 14-208.9 and 14-208.11 deal with the same subject matter, they must be construed in *pari materia* to give effect to each.” *State v. Fox*, 216 N.C. App. 153, 156, 716 S.E.2d 261, 264 (2011) (citation and quotation marks omitted). Under this statutory scheme,

[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. . . .

N.C. Gen. Stat. § 14-208.9(a) (2013).

A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

....

(2) Fails to notify the last registering sheriff of a change of address as required by this Article.

N.C. Gen. Stat. § 14-208.11(a)(2) (2013).

The three essential elements of this offense are “(1) the defendant is a person required to register; (2) the defendant changes his or her

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address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change.” *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 798 (2015).

In the present case, the superseding indictment lists the date of the offense as “December 2, 2013” and classifies the offense as being a violation of “14-208.11(A)(2).” It then states the following:

The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did, as person [sic] required by Article 27A of Chapter 14 of the General Statutes to register, fail to notify the last registering sheriff of a change of address in that the defendant failed to appear in person and provide written notification of his address change to the sheriff of Johnston County within three (3) days of the address change.

While the superseding indictment generally tracks the language of N.C. Gen. Stat. § 14-208.9(a), Defendant challenges the portion of the indictment alleging that he failed to notify the sheriff of his change of address within “three (3) days” of the address change, arguing that the indictment was required to instead state the relevant time period as three *business* days. Because of this omission of the word “business” in referencing the three-day period, Defendant argues that the indictment was fatally flawed and therefore invalid.

In support of his position, Defendant relies on *State v. Barnett*, 223 N.C. App. 65, 733 S.E.2d 95 (2012). In *Barnett*, this Court held that an indictment for the failure of a sex offender to report an address change was insufficient to charge the defendant where “the indictment substantially track[ed] the statutory language set forth in N.C. Gen. Stat. § 14-208.9(a) with respect to the second and third elements of the offense, [but] ma[de] no reference to the first essential element of the offense, *i.e.*, that Defendant be ‘a person required to register.’” *Id.* at 69, 733 S.E.2d at 98. In light of the omission of this entire element of the offense, we held that the indictment did not set forth all of the essential elements of the offense for which the defendant was charged such that the defendant’s conviction was required to be vacated. *Id.* at 70-72, 733 S.E.2d at 99-100. Here, however, unlike in *Barnett*, all of the elements of the offense are referenced on the face of the indictment. We cannot conclude that the omission of the word “business” from the language

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addressing the third element of the offense is analogous to the omission of an entire element as in *Barnett*.

While this Court has previously concluded in an unpublished opinion that the word “business” must be included in an indictment charging a violation of N.C. Gen. Stat. § 14-208.9(a), *see State v. Osborne*, __ N.C. App. __, 763 S.E.2d 16 (2014) (unpublished), it is well settled that “[a]n unpublished opinion establishes no precedent and is not binding authority.” *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) (citation, quotation marks, and brackets omitted). Moreover, our Court has expressly declined to follow *Osborne* in *Leaks*. In *Leaks*, we held that

the *Osborne* Court held that [an] indictment [for failure of a sex offender to report an address change] was fatally defective because it failed to allege that (1) defendant did not provide “*written notice*” of his move, and (2) did not specify the time requirements as within “three *business days*” of the defendant’s move to a new address. In effect, the *Osborne* Court imposed two additional essential elements of the offense set forth in N.C. Gen. Stat. § 14-208.9(a) — the “written notice” requirement and the “three *business days*” requirement. Given the holding in *Osborne*, defendant contends that his indictment was fatally defective because it too did not include the “written notice” requirement. We are not persuaded.

Leaks, __ N.C. App. at __, 771 S.E.2d at 798-99 (internal citation omitted). While we agree that the better practice would have been for the indictment to have alleged here that Defendant failed to report his change of address within “three business days,” we are satisfied that the superseding indictment nevertheless gave Defendant sufficient notice of the charge against him and, therefore, was not fatally defective.

On appeal, Defendant does not argue that he ever did actually live at 2133 Mamie Road following his notification to the Johnston County Sheriff’s Office on 8 July 2013 that this was his new address. Therefore, the distinction between three calendar days and three business days is immaterial in this case as the testimony of Smith and Mauney shows that Defendant had been in violation of the statute upon which he was charged between 8 July 2013 and his arrest.

Furthermore, Defendant did not argue at trial nor does he argue on appeal that he was in any way prejudiced in preparing his defense as a result of the omission of the word “business” from this portion of the

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indictment. Indeed, Defendant does not claim that he (1) was unaware of the offense for which he was being charged; (2) was misled in any way; (3) was precluded from preparing a defense at trial, or (4) may be subjected to double jeopardy for the same offense in the future. *See State v. Jones*, 367 N.C. 299, 306-07, 758 S.E.2d 345, 351 (2014) (explaining that primary purposes of indictment are “(1) to provide such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case” (citation, quotation marks, and brackets omitted)).

Accordingly, we fail to see any valid basis for holding that the superseding indictment was fatally flawed under these circumstances. Defendant’s argument on this issue is therefore overruled.

II. Denial of Motion to Dismiss

[2] Defendant next argues that the trial court erred in denying his motions to dismiss based on the insufficiency of the evidence. Because we conclude that Defendant has failed to preserve this issue for appellate review, we dismiss this portion of his appeal.

The motions to dismiss made by Defendant’s counsel’s at trial were based solely upon the premise that the superseding indictment was invalid. Defendant’s counsel did not expressly make the argument in the trial court that he has raised on appeal, which is that there was insufficient evidence for the charge to proceed to the jury. Therefore, as Defendant failed to properly preserve his sufficiency of the evidence argument for appellate review, we dismiss Defendant’s appeal as to this issue. *See State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 604-05 (concluding that defendant failed to preserve for appellate review argument regarding sufficiency of evidence because his motion to dismiss at trial was based solely on alleged inadequacies in indictment), *cert. denied*, 540 U.S. 988, 157 L.Ed.2d 382 (2003).

III. Ineffective Assistance of Counsel

[3] Finally, Defendant argues, in the alternative, that he was denied effective assistance of counsel as a result of his trial counsel’s failure to assert a motion to dismiss based on the insufficiency of the evidence so as to preserve this argument for appellate review. We disagree.

“In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.”

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State v. Stroud, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This is so because this Court, in reviewing the record, is “without the benefit of information provided by defendant to trial counsel, as well as defendant’s thoughts, concerns, and demeanor, that could be provided in a full evidentiary hearing on a motion for appropriate relief.” *Id.* at 554-55, 557 S.E.2d at 547 (internal citation, quotation marks, and brackets omitted). However, ineffective assistance of counsel claims are appropriately reviewed on direct appeal “when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L.Ed.2d 80 (2005).

In order to establish ineffective assistance of counsel, “a defendant must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense.” *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, __ U.S. __, 182 L.Ed.2d 176 (2012).

Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

In the present case, even if Defendant’s trial counsel had specifically made a motion to dismiss based on the insufficiency of the evidence, the evidence presented by the State was sufficient to raise a jury question as to whether Defendant was guilty of the offense for which he was charged. As such, Defendant cannot satisfy the second element of a claim of ineffective assistance of counsel.

“When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant’s being the perpetrator of the offense. If so, the motion

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to dismiss is properly denied.” *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982).

When determining whether there is substantial evidence to sustain a conviction, all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.

State v. Marion, __ N.C. App. __, __, 756 S.E.2d 61, 68 (citation and brackets omitted), *disc. review denied*, 367 N.C. 520, 762 S.E.2d 444-45 (2014).

As noted above, the essential elements for the offense of failure of a sex offender to report a change of address are “(1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change.” *Leaks*, __ N.C. App. at __, 771 S.E.2d at 798. With regard to the first element of the offense — which is unchallenged on appeal — the State presented evidence that Defendant had pled guilty to indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 in Johnston County Superior Court on 10 September 2001.

As to the second and third elements, the State presented evidence that Defendant had last registered a change of address with the Johnston County Sheriff’s Office on 8 July 2013, listing his address as 2133 Mamie Road in Four Oaks, North Carolina. At trial, the State introduced the testimony of Baker and Lee, who discovered Defendant living at Baker’s rental house at 2871 Old School Road on 29 November 2013. Lee testified at trial as follows:

Q. And you stated earlier when [Defendant] came out he said I’ve been living here since I got out of prison?

A. He said he had been in prison, that he apologized and he didn’t have nowhere to go and that he had been staying there for some time.

Q. Did he say approximately how long he had been staying there?

A. I think he said – from my understanding was thirty days.

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Q. Okay. He stated to you I've been living here about thirty days?

A. Yeah, about a month.

The State also introduced the testimony of Smith and Mauney, the actual residents of 2133 Mamie Road, to demonstrate that Defendant had never actually resided at that address. Mauney testified as follows:

Q. How long have you lived at 2133 –

A. Fourteen years.

Q. Fourteen years. And in the 14 years that you've lived there, Ms. Mauney, has [Defendant] ever lived in your residence with you?

A. No ma'am.

Q. And do you know [Defendant] at all, Ms. Mauney?

A. No.

Finally, the State offered testimony at trial from Captain Strickland that Defendant never notified the Sheriff's Office of a new change of address between 8 July 2013 and the date of his arrest. The testimony from Lee, Mauney, and Captain Strickland constitutes substantial evidence of the second and third elements of the offense.

Because Defendant (1) never lived at the address he provided to the Johnston County Sheriff's Office on 8 July 2013; (2) was shown to have been living instead at the 2871 Old School Road address for approximately 30 days before he was discovered there and his presence reported to the Johnston County Sheriff's Office; and (3) never provided the State with a new address, sufficient evidence clearly existed for the jury to have reasonably found that he was in violation of N.C. Gen. Stat. § 14-208.9(a).

Defendant contends that because (1) the superseding indictment lists the date of the offense as 2 December 2013; and (2) that date was three calendar days after Defendant was discovered on 29 November 2013 at the 2871 Old School Road address, by the terms of the statute he would have had until *5 December* 2013 (the date that fell three *business* days after 29 November 2013) in which to notify the Sheriff's Office of his new address and that "[t]he State offered no evidence that [Defendant] had failed to give the required change of address notice on or before" 5 December 2013. We are not persuaded.

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As discussed in the preceding section, the undisputed evidence was that Defendant notified the Johnston County Sheriff's Office on 8 July 2013 of a false address. Therefore, while the superseding indictment listed the date of the offense as 2 December 2013, Defendant's violation of the statute had actually been ongoing for almost five months prior to that date. Thus, while he was, in fact, in violation of the statute on 2 December 2013, he was likewise in violation for a period of over 140 days prior to that date.

Accordingly, had Defendant's trial counsel specifically asserted a motion to dismiss based on insufficiency of the evidence, the motion would have lacked merit. *See State v. Pierce*, __ N.C. App. __, __, 766 S.E.2d 854, 859-60 (2014) (finding sufficient evidence that defendant violated N.C. Gen. Stat. § 14-208.9(a) where "testimony of [two neighbors] support[ed] a reasonable inference that defendant resided with [his girlfriend] at her home" and girlfriend's home was not address he had registered with sheriff's office), *disc. review denied*, __ N.C. __, __ S.E.2d __ (2015); *Fox*, 216 N.C. App. at 158, 716 S.E.2d at 265-66 (evidence was sufficient to support conviction where defendant had reported that he was living with his father, his father "advised the officer that [the defendant] did not live [with him], and that defendant lived with his girlfriend somewhere in Morehead by the old Belk," and neighbor of defendant's girlfriend testified "defendant stayed at [his girlfriend's] apartment every day and evening" (brackets omitted)).

Therefore, because Defendant cannot establish prejudice as a result of his trial counsel's failure to make a motion to dismiss in the trial court on this specific ground, we conclude that his ineffective assistance of counsel claim lacks merit. *See State v. Fraley*, 202 N.C. App. 457, 467, 688 S.E.2d 778, 786 ("[I]f the evidence is sufficient to support a conviction, the defendant is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence."), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

Conclusion

For the reasons stated above, we conclude that (1) Defendant's superseding indictment was not fatally flawed; (2) Defendant's appeal of the denial of his motion to dismiss must be dismissed; and (3) Defendant has failed to show that he received ineffective assistance of counsel.

NO ERROR; DISMISSED IN PART.

Judge STEELMAN concurs.

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Judge HUNTER, JR. dissents in a separate opinion.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

HUNTER, JR., Robert N., Judge, DISSENTING.

The North Carolina Constitution provides “no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment.” N.C. Const. art. I, § 22.

It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority.

State v. Barnett, 223 N.C. App. 65, 68, 733 S.E.2d 95, 97–98 (2012) (internal citations and quotation marks omitted). In order to be valid and thus confer jurisdiction upon the trial court, “[a]n indictment charging a statutory offense must allege all of the essential elements of the offense.” *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). In the 1800s, our Supreme Court required near identical language in the indictment as in the statutory offense. For example, the Supreme Court held “the use of the word in the singular will not do, when it should be in the plural.” *State v. Sandy*, 25 N.C. 570, 575, 3 Ired. 570, 575 (1843). Today, pleading requirements for criminal indictments are more relaxed: “The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

Here, Defendant was indicted for the statutory offense of failure to report a change of address as a sex offender in violation of N.C. Gen. Stat. § 14-208.11(a)(2). The statute provides any person required to register as a sex offender is guilty of a Class F felony if he “[f]ails to notify the last registering sheriff of a change of address as required by this Article.” N.C. Gen. Stat. § 14-208.11(a)(2) (2014). N.C. Gen. Stat. § 14-208.9 dictates the procedure for effectuating a proper change of address with the sheriff. N.C. Gen. Stat. § 14-208.9(a) provides: “If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the *third business day* after the change to the sheriff of the county with whom the person had last registered.” N.C. Gen. Stat. § 14-208.9(a) (2014) (emphasis added). Thus,

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this Court has held the three essential elements of this statutory offense are: “(1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change.” *Barnett*, 223 N.C. App. at 69, 733 S.E.2d at 98.

The indictment in this case neither literally nor substantially charged Defendant with the words of the statute. Instead, the indictment charged Defendant with language that is *substantially different* than the words of the statute—“three days” as opposed to three business days. I am persuaded here by the reasoning of this Court in the unpublished case *State v. Osborne*, ___ N.C. App. ___, 763 S.E.2d 16, COA13-1372, 2014 WL 2993855 (N.C. Ct. App. July 1, 2014). In *Osborne*, we held the indictment was insufficient to charge a violation of N.C. Gen. Stat. § 14-208.11(a)(2) because it used the phrases “without notifying” and “within three days.” *Id.* at *3. This language was insufficient to confer jurisdiction in the trial court because the indictment: (1) did not allege a lack of *written* notice, and (2) alleged a three-day time period rather than a three-*business-day* time period, as required by the statute. *Id.* This Court concluded “not every day is a business day. Thus, in preparing for trial, a defendant would believe the State could prevail by proving that three days had passed before he notified the sheriff’s office of his move rather than the correct required showing that three *business* days had passed.” *Id.* I find this reasoning persuasive.

Furthermore, the majority’s reliance on this Court’s holding in *Leaks* is misplaced. The majority opinion states “our Court has expressly declined to follow *Osborne* in *Leaks*.” The *Leaks* Court declined to follow *Osborne* only with regard to the “written notice” requirement. *State v. Leaks*, ___ N.C. App. ___, ___, 771 S.E.2d 795, 797–98 (2015). The “three business days” element of the indictment was not at issue in *Leaks*, as the defendant was properly charged by the precise language of the statute: “by failing to notify the Forsyth County Sheriff’s Office of his change of address with in [sic] three business days after moving from his last registered address.” *Id.* at ___, 771 S.E.2d at 798. Thus, *Leaks* is inapposite.

Because I would hold the indictment here contained a fatal variance, and thus jurisdiction was never conferred in the trial court, I do not address the remaining issues on appeal. I would vacate the judgment entered upon Defendant’s conviction.

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STATE OF NORTH CAROLINA

v.

CRYSTAL GAIL MANGUM

No. COA14-909

Filed 7 July 2015

1. Evidence—prior acts—similarity

The trial court did not err in a second-degree murder prosecution by admitting evidence of an earlier incident where the evidence was sufficiently similar. Prior acts or crimes are sufficiently similar to the crime charged “if there are some unusual facts present in both” incidents. Here, the evidence supported the findings, which supported the conclusions, especially in terms of the relationship between the parties involved, defendant’s escalation of the violence in response to being restrained, and the general nature of both incidents.

2. Evidence—prior acts—temporal proximity

A prior similar event was sufficiently proximate to be introduced into a second-degree murder prosecution where there was a fourteen-month gap between events but there were substantial similarities between the events. The weight of the evidence was to be determined by the jury.

3. Evidence—prior acts—not more prejudicial than probative

The trial court did not abuse its discretion in a second-degree murder prosecution where evidence of a prior incident was admitted despite an objection under N.C.G.S. § 8C-1, Rule 403. There were significant points of commonality between the Rule 404(b) evidence and the offense charged, and the trial court handled the process conscientiously. Moreover, there was no reasonable possibility that the jury would have reached a different result absent this evidence.

Appeal by defendant from judgment entered 22 November 2013 by Judge Paul Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 20 January 2015.

Attorney General Roy A. Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

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CALABRIA, Judge.

Crystal Mangum (“defendant”) appeals from judgment entered upon a jury verdict finding her guilty of second degree murder. We find no error.

I. Background

Defendant and Reginald Daye (“Daye”) met through mutual friends in January 2011. One month later, the two began living together along with defendant’s three children. On 3 April 2011, defendant and Daye went to a party around 11:00 p.m. and returned to the apartment complex where they lived (“the apartment”) approximately an hour and a half later. Durham Police Department (“DPD”) Officer Curtis Knight (“Knight”) was waiting for an illegally-parked vehicle to be towed from the apartment complex when defendant and Daye approached Knight’s patrol car and asked what he was doing. Knight told them. Daye and defendant then entered the apartment, but a few minutes later they were back outside. Knight heard Daye yelling, “give me my money” at defendant, referring to \$700 he had given defendant to hold for rent. After Knight told them that they could not be outside making so much noise, defendant and Daye went back inside the apartment.

Daye’s nephew, Carlos Wilson (“Wilson”), who lived in the same apartment complex, also heard the commotion and went outside where he encountered Knight. Wilson told Knight he would check on Daye; however, no one answered when Wilson knocked on defendant and Daye’s apartment door. Wilson left and went to bed, but was awakened by a knock on his door at approximately 3:00 a.m. When he opened the door, Wilson found Daye standing there, shirtless, and bleeding from his left side. Daye told Wilson that defendant had stabbed him. Wilson then called 911 and attempted to provide medical aide until the paramedics arrived.

At approximately 3:20 a.m., DPD Officer Bradley Frey (“Frey”) arrived at the apartment. Daye told Frey that he and defendant argued about money, the argument became hostile, and defendant stabbed Daye with a knife. As a result of a stab wound to the left side of his chest, approximately two to three inches deep, Daye sustained extensive injuries requiring emergency surgery. Daye died a few days later due to complications from the stab wound.

Several DPD officers investigated and found broken glass, multiple knives—both broken and intact—and bloodstains throughout the apartment. A serrated knife, five inches long with Daye’s blood on the blade, was laying flat on the living room couch. Daye’s blood was also found

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on the kitchen counter, the hallway carpet, and the ground and staircase railing outside the apartment. The door from the hallway to the bathroom had been broken off its hinges, and a clump of hair was found on the bathroom floor. Another clump of hair was found in the master bedroom.

DPD Officer C.N. Walker (“Officer Walker”) was also dispatched to the apartment and, upon his arrival, he learned where defendant was located. Shortly thereafter, DPD Officer Charles Franklin and Officer Walker arrested defendant at the nearby home of Liddie Howard (“Howard”), a friend who was watching defendant’s children at the time. When Officer Walker arrived at Howard’s home, he did not observe any obvious injuries on defendant; but after arriving at police headquarters, defendant claimed “to hurt all over.” Defendant had a scratch below her left eye, which was partially scabbed, and a lesion on the side of her lip.

On 18 April 2011, defendant was indicted for the first degree murder of Daye. From December 2011 to November 2013, defendant filed numerous pre-trial motions which included, *inter alia*, a motion *in limine* requesting that the trial court prohibit “the State from mentioning or eliciting from any witness any alleged acts of [defendant’s] prior misconduct . . . or any reference to defendant’s past criminal conviction[s].” At the pre-trial motion hearing, the State informed the court that it intended to offer evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence regarding an altercation that occurred between defendant and a man named Milton Walker (“Walker”) in February 2010 (“the Walker incident”). Walker had known defendant since high school, and the two dated periodically before they began living together in a duplex (“the duplex”) in early 2010. Defendant’s trial counsel expressed concern about the Rule 404(b) evidence, and stated that, “at a minimum,” the issue should be addressed at the appropriate time during trial. The trial court agreed, and asked that the prosecutor alert both the court and defendant prior to the introduction of any evidence sought to be admitted pursuant to Rule 404(b).

Defendant’s trial proceeded in Durham County Superior Court on 12 November 2013 for the first degree murder charge and two charges of larceny of a chose in action. During trial, the State addressed the Rule 404(b) issue regarding the Walker incident to the trial court prior to calling any 404(b) witnesses. The trial court held a *voir dire* hearing on the evidence, during which the State summarized the facts of the Walker incident and sought to introduce the evidence pursuant to Rule 404(b) for the purposes of showing motive, opportunity, intent, absence of mistake or accident, plan, knowledge, and preparation. Defendant objected, but the trial court ultimately determined that a majority of the

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Rule 404(b) evidence was admissible and probative of motive, intent, and plan. As a result, multiple witnesses, including Walker, were permitted to testify regarding defendant's involvement in the Walker incident.

The State also presented evidence from DPD Lieutenant Marianne Bond ("Bond"). Prior to his death, Daye spoke with Bond twice regarding the events that transpired between himself and defendant. Bond testified to Daye's statement of the events. After returning from the party, Daye and defendant argued in the apartment's parking lot until a DPD officer approached and told them to calm down. Inside the apartment, defendant called a male—whom Daye believed to be a police officer—to come pick her up and stated that she had a date. Defendant and Daye argued about defendant bringing other men to the apartment. Daye also demanded that defendant return his \$700. After more arguing, defendant entered the bathroom and locked the door. Believing defendant had called an unidentified police officer to pick her up, Daye kicked in the bathroom door, grabbed defendant by the hair, and pulled her into the master bedroom. At some point, defendant retrieved multiple knives from the kitchen and "came at him three or four times." As Daye attempted to protect himself, he received a cut on his hand. Daye was heading to the front door trying to leave the apartment when defendant stabbed him in the hallway.

Daye also told Bond that he grabbed defendant during their argument, but he did not recall punching her that night, and insisted that he had never punched her. However, defendant hit Daye four to five times, including once in the eye. Daye denied ever holding or throwing any knives during the altercation. In response to Bond's question regarding multiple hair samples found in the apartment during the investigation, Daye admitted that he was probably the one that pulled out defendant's hair.

Defendant testified in her own defense, and gave a much different account. According to defendant, Daye had never before complained about defendant bringing other men to the apartment. However, on the night in question, Daye felt disrespected because defendant was talking to other men. During their argument, Daye suddenly hit defendant, causing her to fall down on the living room floor. The fighting spilled over to the master bedroom. At some point, Daye went to the kitchen, retrieved several knives, and began throwing them at defendant as she hid behind a mattress. After defendant locked herself in the bathroom, Daye kicked in the door and dragged her by the hair back to the master bedroom, where Daye pinned defendant against the floor, hitting and choking her. In response, defendant grabbed a knife off the floor, "poked" Daye in his side, exited the apartment, and ran to Howard's home.

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On 22 November 2013, the jury returned a verdict finding defendant guilty of second degree murder and not guilty on the larceny charges. The trial court entered judgment and sentenced defendant to a minimum term of 170 months and a maximum term of 216 months to be served in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Analysis

[1] Defendant contends that the trial court committed reversible error by admitting evidence concerning the Walker incident pursuant to Rule 404(b). We disagree.

The challenged evidence showed the following: on 17 February 2010, defendant and Walker argued all day, and that evening, defendant told Walker she wanted to end their relationship. Defendant also told Walker she had someone coming over to the duplex the next day. Later, defendant told Walker she was going to take a picture of his penis and put it on the Internet. Defendant began tugging at Walker's pants. When Walker pushed defendant away, she began swinging her arms at him, prompting Walker to grab defendant's neck and restrain her until he thought she had calmed down. When defendant was released, she grabbed a chair and began hitting Walker with it. After Walker grabbed the chair and tossed it aside, defendant grabbed a step stool and began jabbing Walker until he gained control of the stool and threw it to the side. At that time, defendant told Walker she had "something better" and ran to the kitchen. When Walker heard the sound of silverware clinking, he ran out of the duplex and hid across the street.

DPD Officer Hillary Thompson ("Thompson") arrived at the duplex in response to a domestic violence call. Walker was not present when Thompson arrived, but his car was still parked in front of the duplex. DPD Corporal John Tyler ("Tyler") also responded to the call, and noticed that all four tires on Walker's vehicle had been slashed and the windshield was completely smashed. Defendant told both Thompson and Tyler that she did not need any assistance from law enforcement and refused to tell them anything about the events that resulted in the domestic violence call.

When Walker noticed the police presence, he returned to the duplex and was greeted outside by Tyler. Once defendant, Walker, Tyler, and Thompson were all inside the duplex, Walker began to describe the events to Tyler. At this time, Thompson was positioned in the hallway, and defendant was in the back of the duplex. As Walker was describing the events to Tyler, defendant ran from the back of the duplex, jumped

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over Thompson's back, and said to Walker, "I'm going to stab you, mother fu****." Walker testified that defendant had a knife in her hand, but Thompson and Tyler both stated they did not see a knife.

Domestic Violence Investigator Leslie Bond ("Investigator Bond") later interviewed Walker and defendant separately. Investigator Bond observed Walker had scratches on his neck, back, and arms. She saw no visible injuries to defendant. During the interview, defendant was not initially forthcoming about damaging Walker's vehicle or threatening him, but eventually admitted that she damaged Walker's vehicle and told Walker that she would stab him if he came back into her house. Defendant also said that Walker had grabbed her around the neck and hit her, which caused her to scratch his arms.

In the instant case, defendant makes two related arguments. First, defendant argues that the prior acts detailed in the Walker incident testimony are not sufficiently similar to the altercation with Daye that led to the murder charge against her. According to defendant, the "two events were starkly different in their details and in their core nature." Second, defendant argues that the prior acts described by Walker and the State's other Rule 404(b) witnesses are too remote in time to be considered relevant.

"When the trial court has made findings of fact and conclusions of law to support its [Rule] 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Our appellate courts "review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.* (italics added). Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). But such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

"Even if evidence is admissible according to Rule 404(b), it must also be scrutinized under Rule 403, which provides for the exclusion of otherwise admissible evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *State v. Lanier*, 165 N.C. App. 337, 344, 598 S.E.2d 596, 601 (2004) (quoting N.C. Gen. Stat. § 8C-1, Rule 403). "In each case, 'the burden is on the defendant to

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show that there was no proper purpose for which the evidence could be admitted.’” *State v. Williams*, 156 N.C. App. 661, 664, 577 S.E.2d 143, 145 (2003) (quoting *State v. Willis*, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000)). “The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion.” *State v. Hipps*, 348 N.C. 377, 405–06, 501 S.E.2d 625, 642 (1998).

Here, the trial court properly conducted a *voir dire* hearing to determine whether evidence of the Walker incident was of the type that is made admissible under Rule 404(b) and was relevant for a purpose other than propensity. See *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986) (the trial judge must determine whether extrinsic conduct evidence is offered pursuant to Rule 404(b), is of a proper type, and is relevant for some purpose other than to show the defendant’s “propensity for the type of conduct for which he is being tried”). Next, the court found that the events at issue, which occurred fourteen months apart, were temporally proximate. The court then found that the Walker incident and Daye’s death were “substantially similar.” Both incidents involved: (1) defendant and a male individual with whom she was romantically involved; (2) the “escalation of an argument that ended in the use of force between the participants”; (3) restraint of defendant by her male counterpart and defendant’s subsequent release from that restraint; (4) the “escalation of violence and repeated restraint”; and (5) “statements made [by defendant] . . . regarding the use of a knife or stabbing.” The court also found defendant’s alleged attempt to assault Walker with a knife and the fact that Walker heard the clattering of silverware were substantially similar to this case.

As a result of these findings, the trial court ruled that evidence regarding certain portions of the Walker incident was both admissible and “particularly [probative] of motive, intent, and plan.” However, certain portions of the Walker incident—specifically, the facts that clothing was set on fire and children were present in the apartment—were ruled inadmissible under Rules 403 and 404(b). The trial court then conducted the Rule 403 balancing test and concluded that the probative value of the admissible Walker incident evidence was not substantially outweighed by any unfair prejudice to defendant.

As explained in *State v. Coffey*, Rule 404(b) is

a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to

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but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also “is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.”

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (citation omitted). For such evidence to be deemed relevant, it must have the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C–1, Rule 401 (2013).

Despite the inclusive nature of Rule 404(b), it is still “constrained by the requirements of similarity and temporal proximity.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). In other words, “the ultimate test of admissibility is whether the incidents are sufficiently similar to those in the case at bar and not so remote in time as to be more prejudicial than probative under . . . Rule 403[.]” *State v. Love*, 152 N.C. App. 608, 612, 568 S.E.2d 320, 323 (2002). Prior acts or crimes are sufficiently similar to the crime charged “if there are some unusual facts present in both” incidents, *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890 (1991) (citations omitted) (internal quotations omitted), that “go to a purpose other than propensity[.]” *Beckelheimer*, 366 N.C. at 132, 726 S.E.2d at 160. The similarities between the two situations need not “rise to the level of the unique and bizarre.” *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988). Remoteness in time, “for purposes of [Rule] 404(b)[,], must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered.” *Hipps*, 348 N.C. at 405, 501 S.E.2d at 642.

To support her claim that the prior acts described in the Walker incident testimony were not sufficiently similar for purposes of Rule 404(b), defendant relies on four sexual assault cases: *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983); *State v. White*, 135 N.C. App. 349, 520 S.E.2d 70 (1999); *State v. Webb*, 197 N.C. App. 619, 682 S.E.2d 393 (2009); *State v. Gray*, 210 N.C. App. 493, 709 S.E.2d 477 (2011). Arguing

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by analogy, defendant states that although “courts in this State are most liberal in allowing prior [acts of] the defendant to be admitted in” sexual assault cases, “evidence of prior sexual misconduct [was] excluded as insufficiently similar to the charged offense in [*Moore*, *White*, *Webb*, and *Gray*.]” However, these cases are inapplicable to the situation we confront here.

To begin, the dispositive issue in *Moore*, *White*, *Webb*, and *Gray* was whether the similarities between the prior acts or crimes and the crimes charged were sufficient to provide a reasonable inference that the same person committed both. *Moore*, 309 N.C. at 106-08, 305 S.E.2d at 544-46; *White*, 135 N.C. App. at 353-54, 520 S.E.2d at 73-74; *Webb*, 197 N.C. App. at 623, 682 S.E.2d at 395-96; *Gray*, 210 N.C. App. at 512-13, 709 S.E.2d at 490-91. Here, there is no question that defendant was involved in both the Walker incident and the altercation that led to Daye’s stabbing and eventual death. Furthermore, the analysis in *Moore*, *White*, *Webb*, and *Gray* hinged on each respective Court’s decision that the differences in the incidents at issue were more significant than the similarities. For example, in *White*, this Court granted the defendant—who had been charged with first degree rape and non-felonious breaking or entering—a new trial because he was prejudiced when the trial court allowed the State to introduce Rule 404(b) evidence of his subsequent act of sexual misconduct that was not sufficiently similar to the crime charged. 135 N.C. App. at 353-54, 520 S.E.2d at 73. Although both incidents involved young female victims who were allegedly assaulted by the defendant in their own homes, these similarities were substantially outweighed by the differences between the crime charged and the Rule 404(b) evidence: the assaults occurred under different circumstances and at different times of day; one assault was perpetrated with the use of threats and a weapon while the other was not; and the victims reacted in very different ways. *Id.* at 353, 520 S.E.2d at 73. As a result, the Rule 404(b) evidence “tend[ed] only to show the propensity of the defendant to commit sexual acts against young female children, a purpose for which the evidence cannot be admitted.” *Id.* at 354, 520 S.E.2d at 74.

In contrast to *Moore*, *White*, *Webb*, and *Gray*, we find strong similarities between the crime charged and the Walker incident described by the State’s Rule 404(b) witnesses, especially in terms of the relationship between the parties involved, defendant’s escalation of the violence in response to being restrained, and the general nature of both incidents. Specifically, as the trial court found, both incidents involved defendant and her current boyfriend, escalation of an argument that led to the use of force between the participants; defendant’s further escalation

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of the argument; and defendant's deliberate decision to obtain a knife from the kitchen.

Given these similarities, the Walker evidence was probative of defendant's motive, intent, and plan in the instant case. The Rule 404(b) evidence helped establish defendant's motive in stabbing Daye "as it . . . show[ed] how defendant acted after" the break-up and "what [s]he was motivated to do in attempting to effect a satisfactory resolution." *State v. Parker*, 113 N.C. App. 216, 224, 438 S.E.2d 745, 750 (1994). Indeed, this Court has explicitly noted that "[e]vidence of prior behavior following a rejection in a romantic relationship is admissible to prove motive[.]" *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000) (citing *Parker*, 113 N.C. App. at 224, 438 S.E.2d at 750–51). *Parker* and *Aldridge* establish the general principle that prior instances demonstrating a defendant's violent response to the deterioration of a relationship are relevant for purposes other than propensity. This principle is especially applicable here, where defendant acted belligerently and violently toward Walker after their relationship collapsed. Moreover, the Walker incident was probative of defendant's intent to stab Daye because, in order to impose her will, defendant deliberately retrieved a knife for the announced purpose of committing a stabbing. Finally, because the features of both incidents were substantially similar, the Rule 404(b) evidence was admissible to show the existence of defendant's plan to stab Daye after becoming enraged during the course of their altercation. See *State v. Barfield*, 298 N.C. 306, 329, 259 S.E.2d 510, 529–30 (1979) ("Evidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step." Essentially, "a concurrence of common features" must be present in both instances.), *abrogated in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Consequently, the State's evidence supports the trial court's findings, and the findings support the court's conclusion on the similarity requirement.

[2] On the issue of temporal proximity, defendant argues that the Walker incident, as detailed in the challenged testimony, was too remote in time to be admissible under Rule 404(b), especially for the purpose of proving that defendant "had in her mind a . . . plan to engage in assaults with a knife."

"[R]emoteness in time generally affects only the weight to be given [Rule 404(b)] evidence, not its admissibility." *State v. Parker*, 354 N.C. 268, 287, 553 S.E.2d 885, 899 (2001) (citations omitted) (internal quotation marks omitted). Although "[r]emoteness in time between an uncharged

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crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan[.]” it “is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident[.]” *Stager*, 329 N.C. at 307, 406 S.E.2d at 893.

In support of her contention that the Walker evidence was too remote in time to be relevant to the murder charge in this case, defendant cites *State v. Shane*, 304 N.C. 643, 655–56, 285 S.E.2d 813, 820–21 (1982) (holding that a seven-month gap between events that occurred at different places and involved different women was too remote and negated the plausibility of an ongoing and continuous plan) and *State v. Jones*, 322 N.C. 585, 590–91, 369 S.E.2d 822, 825 (1988) (holding that a seven-year gap between prior acts and the offenses charged rendered 404(b) evidence inadmissible). However, we need not discuss *Shane* and *Jones* in depth.

In *Shane*, our Supreme Court based its holding on significant similarities between the prior act and the offense charged, concluding that the passage of time was sufficient to preclude the evidence at issue. 304 N.C. at 655–56, 285 S.E.2d at 820–21. As for *Jones*, the Court simply decided that, given the facts of the case, a seven-year differential “raise[d] serious concerns about the probative nature of [the Rule 404(b)] evidence.” 322 N.C. at 589, 369 S.E.2d at 824. In the instant case, we have already held that the similarities between defendant’s prior act and the offense charged were *substantial*. “[T]he more striking the similarities between the facts of the crime charged and the facts of the prior bad act, the longer evidence of the prior bad act remains relevant and potentially admissible for certain purposes.” *Gray*, 210 N.C. App. at 507, 709 S.E.2d at 488. Furthermore, as noted above, “[r]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case[.]” *Hipps*, 348 N.C. at 405, 501 S.E.2d at 642. On these facts, a fourteen-month gap between the incidents is not too remote. Significantly, our Supreme Court has repeatedly upheld the admission of Rule 404(b) evidence in cases where a significant lapse of years between incidents existed. *See, e.g., Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (holding that, where Rule 404(b) evidence was offered for purposes of intent, motive, plan, preparation, and absence of accident, “the death of the defendant’s first husband ten years before the death of her second was not so remote as to have lost its probative value”); *State v. Carter*, 338 N.C. 569, 588–89, 451 S.E.2d 157, 167–68 (1994) (affirming admissibility of Rule 404(b) evidence of prior assault despite eight-year lapse between assaults); *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996) (concluding that

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incidents as remote as twenty-seven years earlier were not too remote in time to prove a common scheme or plan); *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) (holding that a ten-year gap between instances of distinct and bizarre sexual misbehavior did not render them so remote as to make the evidence irrelevant or negate the existence of a common scheme or plan). Given the substantial similarities between the Walker incident and Daye's stabbing, the fourteen-month gap between the events "was not so significant as to render [defendant's] prior acts irrelevant . . . , and thus, temporal proximity of the acts was a question of evidentiary weight to be determined by the jury." *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160. Accordingly, the trial court did not err in ruling that the majority of the State's 404(b) evidence was relevant and admissible to show defendant's plan, intent, and motive to stab Daye.

[3] Having determined that the Rule 404(b) evidence was sufficiently similar and not too remote in time, we now review the trial court's 403 ruling for abuse of discretion. As this Court has recognized, "[e]vidence is not excluded under [Rule 403] simply because it is probative of the offering party's case and is prejudicial to the opposing party's case. Rather, the evidence must be *unfairly* prejudicial." *State v. Gabriel*, 207 N.C. App. 440, 452, 700 S.E.2d 127, 134 (2010) (citations omitted). "This determination is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation omitted) (brackets and internal quotation marks omitted).

Here, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give . . . proper limiting instruction[s] to the jury." *Hipps*, 348 N.C. at 406, 501 S.E.2d at 642. Outside the presence of the jury, the trial court heard arguments from the attorneys regarding the Rule 404(b) evidence and ruled on its admissibility. The trial court also excluded portions of the Walker incident that did not share sufficient similarity to defendant's altercation with Daye. Significantly, the trial court gave numerous limiting instructions during the course of the Rule 404(b) testimony and one before its final charge to the jury. "The law presumes that the jury heeds limiting instructions that the trial [court] gives regarding the evidence." *State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983). Given the significant points of commonality between the Rule 404(b) evidence and the offense charged, and the trial court's conscientious handling of the process, the trial court's Rule 403 determination was not "manifestly

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unsupported by reason or . . . so arbitrary it could not have been the result of a reasoned decision.” *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293. Accordingly, we discern no abuse of discretion in the trial court’s determination that the danger of unfair prejudice did not substantially outweigh the probative value of the Rule 404(b) evidence.

Nevertheless, defendant insists that the trial court’s admission of the Rule 404(b) evidence constituted prejudicial error because the Walker incident “had no probative value beyond serving as evidence of [defendant’s] bad character as a person who would stab a boyfriend for no good or justifiable reason.”

Even if we assumed that the trial court erred in admitting the challenged evidence, defendant would bear the burden of showing that the error was prejudicial. *State v. LePage*, 204 N.C. App. 37, 43, 693 S.E.2d 157, 162 (2010). “A defendant is prejudiced by the trial court’s evidentiary error where there is a ‘reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’” *State v. Miles*, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012) (quoting N.C. Gen. Stat. § 15A-1443(a)). We find no reasonable possibility that, in the absence of the admission of the Rule 404(b) evidence, the jury would have reached a different result.

To begin, our review of the record reveals that there was substantial evidence that defendant acted with the requisite malice to support a second degree murder verdict, particularly the fact that she used a five-inch knife blade to stab and kill Daye. *See State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983) (“Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. . . . Malice may be . . . found if there is an intentional taking of the life of another without just cause, excuse or justification.”) (citations omitted); *State v. Cox*, 11 N.C. App. 377, 380, 181 S.E.2d 205, 207 (1971) (When used in an assault, “a knife with a three-inch blade constitutes a deadly weapon” as a matter of law); *State v. Posey*, ____ N.C. App. ____, ____, 757 S.E.2d 369, 374 (2014) (“[T]he intentional use of a deadly weapon proximately causing death gives rise to the *presumption* that (1) the killing was unlawful, and (2) the killing was done with *malice*.”) (emphasis added) (citation omitted).

In addition, there was substantial evidence before the jury which belied defendant’s claim of self-defense. For example, as the State points out, although defendant claimed she stabbed Daye in the master bedroom as he sat on top of her—hitting and choking her—Daye’s

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blood was not found in that location. Instead, his blood was found in the hallway, where Daye claimed that defendant stabbed him. Evidence that Daye suffered a black eye and defensive injuries during the altercation, while defendant suffered no significant injuries, certainly gave the jury reason to doubt defendant's testimony and accept Daye's version of events.

Finally, defendant's actions following the stabbing suggest that she had not killed in self-defense and indicate a desire to avoid responsibility and prosecution for her actions. After Daye left the apartment, stabbed and bleeding, defendant told a concerned neighbor that everything was fine. Instead of trying to render aid to Daye, defendant fled to Howard's apartment, where she called James Williams ("Williams"), a friend and detention officer. Despite being told by Williams to return to the apartment and call 911, defendant refused to comply with either command. Although defendant eventually dialed 911, she hung up and laid down on the floor. "Defendant's flight after [Daye's stabbing] is clear evidence from which the jury could reasonably infer that defendant knew that [s]he had not killed in self-defense, otherwise [s]he would have stayed and waited for the police to come, or [s]he would have called the police [her]self." *State v. Kirby*, 206 N.C. App. 446, 455, 697 S.E.2d 496, 502 (2010). Accordingly, there was sufficient evidence to establish the jury's verdict finding defendant guilty of second degree murder absent self-defense.

III. Conclusion

Because the Rule 404(b) evidence was sufficiently similar and temporally proximate to the crime charged, the trial court did not err in ruling that it was admissible. Nor did the trial court abuse its discretion in determining that the evidence's probative value was not substantially outweighed by the potential for unfair prejudice. Even if the trial court had erred in admitting the challenged evidence, the error would not have been prejudicial to defendant.

NO ERROR.

Chief Judge McGEE and Judge McCULLOUGH concur.

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[242 N.C. App. 216 (2015)]

STATE OF NORTH CAROLINA

v.

BILLY RAY OXENDINE, JR. & SAMUEL JERREN PEDRO

No. COA14-1236

Filed 7 July 2015

1. Native Americans—hunting license exemption—recognized tribe—tribal land

Defendant Oxendine did not qualify for an exemption to hunting license requirements where he did not show an identity card indicating membership in a recognized Native American tribe. Moreover he was hunting on private property, not tribal land.

2. Hunting and Fishing—hunting without a license—evidence sufficient

The evidence was sufficient to show that defendant Pedro was hunting doves without a license where Pedro was holding a shotgun while associating with a group of dove hunters, one of the hunters shot a dove in Pedro's presence, and, although defendant Pedro repeatedly asserted that he was exempt from the hunting license requirement, he did not deny that he was dove hunting.

Appeal by co-defendants from judgments entered 30 May 2014 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 21 April 2015.

Attorney General Roy Cooper, by Special Deputy Attorney Generals Mary L. Lucasse and Jennie Wilhelm Hauser, for the State.

Farber Law Firm, P.L.L.C., by Sarah Jessica Farber, for defendant-appellant Oxendine.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant Pedro.

BRYANT, Judge.

Where the evidence did not support a proposed jury instruction, the trial court did not err in refusing to give that jury instruction. Where the evidence, taken in the light most favorable to the State, was sufficient to show defendant's commission of an offense, the trial court

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did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

Defendant Billy Ray Oxendine, Jr., was issued two citations, 12 CRS 3688 and 12 CRS 3784, for "tak[ing] [birds] without first having procured a current and valid hunting license" on 1 and 3 September 2012. Co-defendant Samuel Jerren Pedro was issued a citation, 12 CRS 3782, for the same offense on 3 September 2012. The co-defendants were tried together at the 29 May 2014 session of Robeson County criminal court, the Honorable Robert F. Floyd, Jr., Judge presiding. At trial, the State's evidence tended to show the following.

On 1 September 2012, game warden Officer Raymond Harris was on patrol with several other officers when he came across a group of dove hunters. Oxendine was one of the hunters in the group. When Officer Harris asked to see Oxendine's hunting license, Oxendine became hostile and used profanity towards Officer Harris and the other officers. Oxendine stated to the officers that he did not need a hunting license and that the officers were "trampling on his rights." Officer Harris issued a citation, 12 CRS 3688, to Oxendine for hunting without a license.

Two days later, on 3 September 2012, game warden Officer Kyle Young received a call about hunting taking place on private property. When Officer Young and several other officers arrived at the property, they encountered "a large gathering of folks there who were dove hunting." Oxendine and Pedro were part of this group. When approached by Officer Young and asked for his hunting license, Oxendine became "verbally agitated." Both Oxendine and Pedro were "very adamant" that they were not required to have a hunting license. Officer Young issued citations to Oxendine and Pedro, 12 CRS 3784 and 12 CRS 3782, respectively, for hunting without a valid license.

On 8 October 2013, Oxendine made a pretrial motion to dismiss on grounds that the North Carolina Wildlife Commission could not issue a citation to him because he is a Native American and, as a result, he is exempt from the requirement of obtaining a hunting license. Oxendine filed an amended motion to dismiss on 23 October 2013, reasserting his allegation of exemption, and later arguing before the trial court that he was exempt from the requirement of having a hunting license because at the time he was cited by the game warden, "he was participating in a Native American hunt religious ceremony." Pedro filed a motion to dismiss on 6 January 2014, also asserting that because he is Native American he is exempt from the requirement of having a hunting license. Pedro filed a second motion to dismiss on 29 May 2014 on grounds that his

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citation was unconstitutional. The trial court denied all motions to dismiss made by Oxendine and Pedro. Neither Oxendine nor Pedro offered any evidence at trial.

On 30 May 2014, a jury returned guilty verdicts against Oxendine and Pedro on all counts. The trial court sentenced Oxendine to fifteen days imprisonment for each count to be served consecutively, then suspended his sentence and ordered him to serve twelve months supervised probation for each count. The trial court sentenced Pedro to serve fifteen days imprisonment; this sentence was then suspended and Pedro ordered to serve twelve months supervised probation. Oxendine and Pedro each appeal.

On appeal, Oxendine contends (I) the trial court erred in refusing to give a requested jury instruction. In his appeal, Pedro argues that (II) the trial court erred in denying Pedro's motion to dismiss.

*I.**Oxendine's Appeal*

[1] In his sole issue on appeal, Oxendine argues that the trial court erred in refusing to give a requested jury instruction. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted).

When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error.

Ellison v. Gambill Oil Co., 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citations omitted), *aff'd per curiam and disc. review improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009).

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A specific jury instruction should be given when (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation and quotation omitted).

Oxendine argues that the trial court erred in refusing to give his requested jury instruction on legal justification. The instruction requested by Oxendine was as follows:

The defendant has been charged with unlawfully and willfully committing a crime.

For you to find that the defendant unlawfully and willfully committed an offense, the defendant must not have had a legal justification as to why he committed the offense.

For the defendant to have unlawfully and willfully committed the offense of hunting [without] a license, you must consider if he was exempt from getting a license under the exempt[ion in N.C. Gen. Stat. §] 113-276.

The trial court denied Oxendine's request for the proposed jury instruction, stating that neither Oxendine nor Pedro had offered evidence of a legal justification, and that the court had already heard arguments about legal justification based on their motions to dismiss during the pretrial conference and denied them.

On appeal, Oxendine argues that the trial court erred in denying his request for the proposed jury instruction because there was sufficient evidence to show that Oxendine was exempt from the requirement of a hunting license because he had been engaged in a Native American religious hunting ceremony. Pursuant to N.C. Gen. Stat. § 113-276,

[t]he licensing provisions of this Article do not apply to a member of an Indian tribe recognized under Chapter 71A of the General Statutes for purposes of hunting, trapping, or fishing on tribal land. A person taking advantage of this exemption shall possess and produce proper identification confirming the person's membership in a State-recognized tribe upon request by a wildlife enforcement

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officer. For purposes of this section, “tribal land” means only real property owned by an Indian tribe recognized under Chapter 71A of the General Statutes.

N.C.G.S. § 113-276(11) (2013).

Although Oxendine argues that he is “an enrolled member of the Haudenosaunee Confederacy of the Tuscarora Nation,” Oxendine is not a member of a Native American tribe recognized by this State under Chapter 71A of our General Statutes. *See* N.C. Gen. Stat. §§ 71A-1, 3, 4, 5, 6, 7, 7.1, 7.2 (2013) (North Carolina recognizes the following Native American tribes: the Cherokee Indians of Robeson County; the Lumbee Tribe; the Waccamaw Siouan Tribe; the Haliwa-Saponi Indian Tribe; the Coharie Tribe; the Sappony; the Meherrin Tribe; and the Occaneechi Band of Saponi Nation). Officers Harris and Young both testified that Oxendine stated that he was exempt from the requirement of a hunting license and that the officers were “trampling on his rights”; however, Oxendine did not present either officer with an identification card showing membership in a recognized Native American tribe. *See id.* Further, Oxendine presented no evidence at trial to show that he was hunting on tribal land; rather, the evidence showed that Oxendine was hunting on private property (albeit with permission of the property owners). As such, the trial court did not err in refusing to give Oxendine’s proposed jury instruction on legal justification, as the evidence presented showed that Oxendine did not qualify for an exemption to the requirement of a hunting license. Oxendine’s argument is, accordingly, overruled.

II.

Pedro’s Appeal

[2] In his sole issue on appeal, Pedro contends the trial court erred in denying his motion to dismiss. We disagree.

In reviewing a motion to dismiss, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citations omitted). In ruling on a motion to dismiss, the evidence is to be taken in the light most favorable to the State. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citations omitted).

Pedro was charged with a violation of N.C. Gen. Stat. § 113-270.1B(a) which states in pertinent part: “Except as otherwise specifically provided by law, no person may hunt, fish, trap, or participate in any other activity regulated by the Wildlife Resources Commission for which a

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license is provided by law without having first procured a current and valid license authorizing the activity.” N.C.G.S. § 113-270.1B(a) (2013). This offense, commonly referred to as hunting without a license, requires the State to prove that a defendant took wild birds without a valid license. *See State v. Sizemore*, 199 N.C. 687, 690, 155 S.E. 724, 725 (1930) (“No person shall at any time take any wild animals without first having procured a license.”). Pursuant to our General Statutes, a dove is a type of wild bird. *See* N.C.G.S. §§ 113-129(11b)(b) (“Those migratory birds for which open seasons are prescribed . . . [include] Columbidae (wild doves)”; (15a) (defining “Wild Birds” as including “Migratory game birds[.]”).

Pedro argues that the State’s evidence was insufficient to show that Pedro “was preparing to immediately kill a dove.” At trial, the State presented the testimony of Officer Young who described encountering Pedro amongst a group of dove hunters, one of whom, Oxendine, he observed shoot a dove. Officer Young stated that when he saw Pedro, Pedro was holding a shotgun; that Pedro was “very adamant and expressed to me that [he was] not required to have a hunting license. I continued to hear that over and over again.” Officer Young determined, based on his experience as a game warden and the hunting operation he observed that day, that he saw Pedro “immediately preparatory, during, and subsequent to an attempt to take wild birds, to hunt wild birds, whether successful or not.” *See* N.C. Gen. Stat. §§ 113-130(5a) (defining “To Hunt” as “To take wild animals or wild birds.”), (7) (2013) (defining “To Take” as “All operations during, immediately preparatory, and immediately subsequent to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession any . . . wildlife resources.”).

Pedro also contends there was insufficient evidence to show he was immediately preparing to kill a dove because Officer Young did not testify as to whether Pedro’s shotgun was loaded or whether there were “any dead doves in the vicinity of the large gathering of people[.]” This contention is without merit. Officer Young’s testimony that Pedro was holding a shotgun while associating with a large group of dove hunters, and that one of the hunters, Oxendine, shot a dove in the presence of Pedro, was sufficient to show that Pedro was engaged in the act of dove hunting. We further note that although Officer Young testified that Pedro repeatedly asserted that he was exempt from the requirement of having a hunting license, at no point that day did Pedro deny that he was dove hunting. As such, the evidence, taken in the light most favorable to the State, was sufficient to show that Pedro was dove hunting without a

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license. Therefore, the trial court did not err in denying Pedro's motion to dismiss. Pedro's argument is, therefore, overruled.

Accordingly, we find no error in the verdict and judgment of the trial court as to both Oxendine and Pedro.

NO ERROR.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA
v.
JAMES MARK PURCELL

No. COA14-1047

Filed 7 July 2015

1. Evidence—physician's testimony—general behavior of abused children

There was no plain error in a prosecution for sexual offenses with a child where the trial court admitted the testimony of a physician that the victim's delay in reporting anal penetration was consistent with the general behavior of children who have been abused in that manner. The physician was the medical director of a family practice program and a board-certified child abuse pediatrician who did not opine on the victim's credibility.

2. Sentencing—maximum too long—effective date of statute

The trial court erred in sentencing defendant for sexual offenses with a child by applying a statute enacted after defendant committed the crimes and calculating a maximum sentence that was too long.

Appeal by defendant from judgments entered on or about 5 June 2014 by Judge Mary Ann Tally in Superior Court, Hoke County. Heard in the Court of Appeals on 19 February 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Nancy A. Vecchia, for the State.

Marilyn G. Ozer, for defendant-appellant.

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[242 N.C. App. 222 (2015)]

STROUD, Judge.

James Mark Purcell (“defendant”) appeals from judgments entered on jury verdicts, in which the jury found him guilty of rape of a child, two counts of sexual offense with a child, and taking indecent liberties with a child. Defendant contends that (1) the trial court committed plain error in admitting expert opinion testimony and (2) the trial court erred in its sentencing determinations. We find no error in part, reverse in part, and remand.

I. Background

One afternoon in the summer of 2010, S.G.’s mother dropped off eleven-year-old S.G. and her siblings at S.G.’s grandmother’s house.¹ While S.G.’s siblings watched television in her grandmother’s bedroom, S.G. watched television in the living room. S.G.’s grandmother was asleep in the living room. Defendant, S.G.’s uncle, entered the living room and told S.G. to go into his bedroom, and she did. Defendant took off his clothes and told S.G. to take off her clothes and get on his bed. S.G. complied. Defendant then got on top of her and felt her chest, bottom, and vagina with his hands. Defendant performed cunnilingus, anal intercourse, and vaginal intercourse. S.G. was crying, but defendant covered her mouth with his hand.

S.G.’s cousin then came into the house and called for defendant. Defendant jumped off the bed, put on his clothes, and told S.G. to put on her clothes. Defendant and S.G.’s cousin spoke outside the house, and S.G. went back to the living room, still crying. S.G.’s grandmother was still asleep. Defendant walked back into the living room and attempted to make S.G. perform fellatio, but S.G. resisted. After S.G.’s grandmother made some movements in her sleep, defendant left S.G. and went back into his bedroom.

On 17 April 2013, S.G. began crying in class at school, so S.G.’s teacher sent her to the school guidance counselor and school social worker. S.G. reported some of defendant’s sexual abuse to the guidance counselor and social worker but did not disclose anal penetration. The social worker reported her allegations to the Hoke County Department of Social Services. On 13 May 2013, Dr. Danielle Thomas-Taylor, the medical director of a family medicine program in Fayetteville and a board-certified child abuse pediatrician, interviewed S.G. and

1. We use the juvenile victim’s initials to protect her identity.

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performed a physical exam. During this interview, S.G. reported to Dr. Thomas-Taylor that defendant had performed anal intercourse, among other sexually abusive acts.

On or about 2 December 2013, a grand jury indicted defendant for rape of a child, sexual offense with a child based on anal intercourse, sexual offense with a child based on cunnilingus, and two counts of taking indecent liberties with a child. *See* N.C. Gen. Stat. §§ 14-27.2A, -27.4A, -202.1 (2009). On or about 4 June 2014, at the close of the State's evidence at trial, the trial court dismissed one count of taking indecent liberties with a child. On or about 5 June 2014, the jury found defendant guilty of the remaining charges. For the conviction of rape of a child, the trial court sentenced defendant to 483 to 640 months' imprisonment. For the conviction of sex offense with a child based on anal intercourse, the trial court sentenced defendant to 483 to 640 months' imprisonment and ordered that this sentence run consecutively to the sentence imposed for the conviction of rape of a child. The trial court consolidated the conviction of sex offense with a child based on cunnilingus and the conviction of taking indecent liberties with a child. For these convictions, the trial court sentenced defendant to 483 to 640 months' imprisonment and ordered that this sentence run concurrently with the sentence imposed for the conviction of sex offense with a child based on anal intercourse. Defendant gave notice of appeal in open court.

II. Admission of Expert Opinion Testimony

[1] Defendant contends that the trial court committed plain error in admitting Dr. Thomas-Taylor's testimony that S.G.'s delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner.² Defendant asserts that this testimony amounted to an opinion on S.G.'s credibility and thus was inadmissible.

A. Standard of Review

For an appellate court to find plain error, it must first be convinced that, absent the error, the jury would have reached a different verdict. The defendant has the burden of showing that the error constituted plain error.

Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and

2. Defendant concedes that he failed to object to this testimony.

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next that absent the error, the jury probably would have reached a different result.

State v. Larkin, ___ N.C. App. ___, ___, 764 S.E.2d 681, 685 (2014) (citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 841 (2015). “[A] trial court is afforded wide latitude in applying [North Carolina Rule of Evidence] 702 and will be reversed only for an abuse of discretion.” *State v. Carpenter*, 147 N.C. App. 386, 393, 556 S.E.2d 316, 321 (2001) (brackets omitted), *appeal dismissed and disc. review denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851 (2002).

B. Analysis

In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim’s credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (*per curiam*) (citations omitted). “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion[.]” N.C. Gen. Stat. § 8C-1, Rule 702 (2013). “Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences. . . . Where the expert testimony is based on a proper foundation, the fact that this evidence may support the credibility of the victim does not alone render it inadmissible.” *State v. Treadway*, 208 N.C. App. 286, 292-93, 702 S.E.2d 335, 342 (2010) (quotation marks and brackets omitted), *disc. review denied*, 365 N.C. 195, 710 S.E.2d 35 (2011).

The nature of the sexual abuse of children . . . places lay jurors at a disadvantage. Common experience generally does not provide a background for understanding the special traits of these witnesses. Such an understanding is relevant as it would help the jury determine the credibility of a child who complains of sexual abuse. The young child . . . subjected to sexual abuse may be unaware or

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uncertain of the criminality of the abuser's conduct. Thus, the child may delay reporting the abuse. In addition the child may delay reporting the abuse because of confusion, guilt, fear or shame. The victim may also recant the story or . . . be unable to remember the chronology of the abuse or be unable to relate it consistently.

State v. Oliver, 85 N.C. App. 1, 11-12, 354 S.E.2d 527, 533-34, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 57, 64, *remanded pursuant to N.C. Gen. Stat. § 15A-1418(b)*, ___ N.C. ___, 358 S.E.2d 65 (1987). In *Oliver*, this Court held that an expert's opinion on the credibility of children *in general* who report sexual abuse was properly admissible under Rule 702, because the expert "was in a better position to have an opinion than the jury." *Id.* at 11-13, 354 S.E.2d at 533-34. Similarly, in *Carpenter*, an expert testified that "an abused child often delays disclosing the abuse and offered various reasons an abused child would continue to cooperate with an abuser." 147 N.C. App. at 394, 556 S.E.2d at 321. This Court held that this testimony did not amount to an opinion on the victim's credibility and was admissible. *Id.*, 556 S.E.2d at 322.

Here, Dr. Thomas-Taylor gave the following testimony:

[Prosecutor:] Would it surprise you to hear that [S.G.] had not disclosed anal penetration prior to meeting with you on May 13?

[Dr. Thomas-Taylor:] No, it does not surprise me at all.

[Prosecutor:] And why is that?

[Dr. Thomas-Taylor:] Several reasons. One, oftentimes anal intercourse or assaults are the last thing that children will describe. It is sort of a socially—kind of considered a taboo or something odd, and so children don't often speak about it. Usually, the order of things that kids will disclose is vaginal penetration, because that's the way that people normally have sex, and kids think about it, then oral, and usually the one that they don't disclose as often is anal.

Dr. Thomas-Taylor did not opine on S.G.'s credibility; rather, she testified that S.G.'s delay in reporting anal penetration was not surprising given that children who have been sexually abused in that manner often delay in disclosing that particular abuse. Additionally, defendant does not contend that the State failed to lay a proper foundation for Dr. Thomas-Taylor's expert opinion, and we note that Dr. Thomas-Taylor testified that she is the medical director of a family medicine program

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in Fayetteville and a board-certified child abuse pediatrician. The trial court thus did not abuse its discretion in admitting this testimony. See *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (“[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.”); *Carpenter*, 147 N.C. App. at 394, 556 S.E.2d at 322; *Oliver*, 85 N.C. App. at 11-13, 354 S.E.2d at 533-34.

Defendant relies on *State v. Heath*, 316 N.C. 337, 341-43, 341 S.E.2d 565, 568-69 (1986). But *Heath* is distinguishable. There, an expert gave the following testimony:

[Prosecutor:] . . . [D]o you have an opinion satisfactory to yourself as to whether or not [the victim] was suffering from any type of mental condition in early June of 1983, or a mental condition which could or might have caused her to *make up* a story about *the* sexual assault?

. . . .

[Expert:] There is nothing in the record or current behavior that indicates that she has a record of *lying*.

Id. at 340, 341 S.E.2d at 567 (emphasis added). The North Carolina Supreme Court held that the prosecutor’s question was improper, because it was “designed to elicit an opinion of the witness as to whether [the victim] had invented a story, or lied, about defendant’s alleged attack on her.” *Id.* at 341, 341 S.E.2d at 568. The Court also held that the expert’s response was inadmissible, because it was an impermissible opinion on the victim’s credibility. *Id.* at 343, 341 S.E.2d at 569. In contrast, here, the prosecutor properly elicited Dr. Thomas-Taylor’s opinion that S.G.’s delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner. Unlike in *Heath*, the prosecutor did not elicit Dr. Thomas-Taylor’s opinion on S.G.’s credibility. Accordingly, we hold that the trial court did not abuse its discretion in admitting this testimony, nor did it commit plain error. See *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789.

III. Sentencing

A. Standard of Review

[2] We review alleged violations of constitutional rights *de novo*. *State v. Ward*, ___ N.C. App. ___, ___, 742 S.E.2d 550, 552 (2013). “Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.” *State v. Jones*, ___ N.C. App. ___, ___, 767

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S.E.2d 341, 344 (2014), *disc. review denied*, ___ N.C. ___, 771 S.E.2d 304 (2015).

B. Analysis

Defendant next contends that the trial court sentenced him under a statute enacted after his commission of the offenses, in contravention of article 1, section 10 of the U.S. Constitution and article i, section 16 of the North Carolina Constitution. *See* U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. The State agrees with defendant. Although defendant failed to object to the trial court's sentencing determinations, we may review this issue pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2013). *See State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010).

In the indictments, the grand jury alleged that defendant committed the offenses between 1 April 2010 and 19 August 2010. During this time period, N.C. Gen. Stat. § 15A-1340.17(e1) provided:

Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is 340 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus *nine* additional months.

N.C. Gen. Stat. § 15A-1340.17(e1) (2009) (emphasis added). But "Session Laws 2011-192, s. 2(e) through (g), effective December 1, 2011, and applicable to offenses committed on or after that date, . . . in subsection (e)(1), substituted '12 additional month[s]' for 'nine additional months' at the end." *See* N.C. Gen. Stat. § 15A-1340.17, Effect of Amendments (2011). Additionally, "Session Laws 2011-307, s. 1, effective December 1, 2011, and applicable to offenses committed on or after that date, added subsection (f)." *Id.* Subsection (f) provides:

Unless provided otherwise in a statute establishing a punishment for a specific crime, for offenders sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus *60* additional months.

N.C. Gen. Stat. § 15A-1340.17(f) (2011) (emphasis added).

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Here, the trial court found that defendant had a prior record level of VI. For the conviction of rape of a child, a B1 felony, the trial court sentenced defendant in the presumptive range to 483 to 640 months' imprisonment. *See* N.C. Gen. Stat. § 14-27.2A. For the conviction of sex offense with a child based on anal intercourse, a B1 felony, the trial court sentenced defendant in the presumptive range to 483 to 640 months' imprisonment and ordered that this sentence run consecutively to the sentence imposed for the conviction of rape of a child. *See id.* § 14-27.4A. The trial court consolidated the conviction of sex offense with a child based on cunnilingus, a B1 felony, and the conviction of taking indecent liberties with a child, a Class F felony. *See id.* §§ 14-27.4A, -202.1. For these convictions, the trial court sentenced defendant in the presumptive range to 483 to 640 months' imprisonment and ordered that this sentence run concurrently with the sentence imposed for the conviction of sex offense with a child based on anal intercourse. In total, the trial court sentenced defendant to 966 to 1,280 months' imprisonment.

Defendant does not contend that the trial court erred in sentencing him to a minimum term of imprisonment of 966 months; rather, he argues that the trial court erred in sentencing him to a maximum term of imprisonment of 1,280 months. The applicable version of N.C. Gen. Stat. § 15A-1340.17 provides that the trial court add nine months, not sixty months, to the 120% figure. N.C. Gen. Stat. § 15A-1340.17(e1) (2009). We calculate that the maximum term of imprisonment for each sentence should have been 589 months, rather than 640 months. *See id.* The trial court thus should have imposed a total sentence of 966 to 1,178 months' imprisonment. *See id.* Accordingly, we hold that the trial court erred in its sentencing determinations and remand this case to the trial court for resentencing.

IV. Conclusion

We hold that the trial court committed no error during the guilt-innocence phase of the trial. But we reverse the trial court's sentencing orders and remand this case to the trial court for resentencing.

NO ERROR IN PART, REVERSED IN PART, AND REMANDED.

Judges DILLON and DAVIS concur.

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[242 N.C. App. 230 (2015)]

STATE OF NORTH CAROLINA, PLAINTIFF

v.

SHAWN DAVID SULLIVAN, DEFENDANT

No. COA14-1380

Filed 7 July 2015

1. Indictment and Information—facially invalid indictments—felonious sale/delivery of controlled substance—failure to name controlled substances in Schedule III

The trial court lacked jurisdiction on three charges of felonious sale/delivery of a controlled substance because the indictments were facially invalid as they did not name controlled substances listed in Schedule III of the North Carolina Controlled Substances Act. Neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are substances that are included in Schedule III. Further, none of these substances are considered trade names for other substances included in Schedule III.

2. Indictment and Information—sale and/or delivery of drugs—identity of purchaser—no evidence of prejudice, fraud, or misrepresentation

The trial court did not err by denying defendant's motion to dismiss the sale and/or delivery charges in case numbers 10 CRS 60224, 10 CRS 60232, 10 CRS 60225, 10 CRS 60233, and 10 CRS 60234 based on his contention that there was a fatal variance between the indictments and the evidence produced during the State's case-in-chief including that there was no evidence that he sold or delivered a controlled substance to A. Simpson. Neither during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson's identity or prejudiced by the fact that the indictment identified "A. Simpson" as the purchaser instead of "Cedric Simpson" or "C. Simpson." There was no evidence of prejudice, fraud, or misrepresentation.

Appeal by defendant from judgments entered 15 January 2013 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 7 May 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Scott Stroud, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

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[242 N.C. App. 230 (2015)]

ELMORE, Judge.

On 16 May 2011 and 25 June 2012, Shawn David Sullivan (defendant) was indicted on twenty-nine drug-related offenses allegedly involving steroids and human growth hormone. Defendant was tried on his not-guilty plea during the 7 January 2013 session of New Hanover County Superior Court. The jury found defendant guilty of ten of the offenses. Pertinent to this appeal, defendant was found guilty of selling and/or delivering Uni-Oxidrol, Uni-Oxidrol 50, and Sustanon.

Judge Hockenbury consolidated the convictions into two judgments, sentencing defendant to two consecutive terms of five to six months imprisonment, suspended for a period of eighteen months supervised probation. Defendant raises two issues on appeal. He first challenges three of his convictions on the basis that the indictments charging the offenses are facially invalid. We agree with defendant and vacate the requisite three convictions. Next, defendant argues that the evidence presented by the State was insufficient to support five of his convictions. We are not convinced, and accordingly we overrule defendant's second issue on appeal.

I. Background

The facts of this case are not in dispute. On 6 August 2010, Cedric Simpson was stopped for a traffic violation in New Hanover County by Sheriff's Deputy Anthony Bacon, who had information that Mr. Simpson trafficked in cocaine. A K-9 unit searched Mr. Simpson's vehicle during the stop. Steroids and prescription medication were recovered, but no cocaine was found in the vehicle.

Mr. Simpson informed law enforcement that he had purchased the steroids found in his vehicle from defendant. Mr. Simpson alleged that he and defendant had known each other for approximately fifteen years, and that they often went to the gym or movies together. Law enforcement arranged for Mr. Simpson to complete multiple controlled buys of controlled substances, primarily steroids, from defendant.

On 3 September 2010, Mr. Simpson allegedly purchased from defendant 118 pills of Uni-Oxidrol, which resulted in defendant being charged in 10 CRS 60225 for felonious possession with intent to sell/deliver Uni-Oxidrol and Uni-Oxidrol 50. Mr. Simpson also allegedly purchased a bottle of liquid testosterone, which resulted in defendant being charged in 10 CRS 60224 for felonious possession with intent to sell/deliver Testosterone Enanthate, and for intentionally maintaining a building for the purpose of selling the controlled substance(s) Uni-Oxidrol and Sustanon.

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On 21 September 2010, Mr. Simpson allegedly purchased from defendant a bottle containing 50 pills of Uni-Oxidrol 50, and a bottle of liquid labeled “Sustanon 250.” The pills became the basis for the two charges in 10 CRS 60233 for felonious possession with intent to sell/deliver Uni-Oxidrol. The liquid became the basis for the two charges in 10 CRS 60232 for felonious possession with intent to sell/deliver Sustanon, and for intentionally maintaining a building for the purpose of selling the controlled substance(s) Uni-Oxidrol and Sustanon.

On 29 September 2010, Mr. Simpson allegedly purchased from defendant three glass bottles of liquid labeled Trenbolone Acetate, which became the basis for the charges in 10 CRS 60234 for felonious possession with intent to sell/deliver Trenbolone Acetate, and for intentionally maintaining a building for the purpose of selling the controlled substance Trenbolone Acetate.

On 2 October 2010, the Sheriff’s Department executed a search warrant on defendant’s home and place of business. At defendant’s home authorities found no controlled substances, but they found \$120.00 of cash in a safe. The currency in the safe matched the “buy money” Mr. Simpson used to make the purchases from defendant during the controlled buys.

Defendant now appeals his convictions stemming from the alleged sale/transfer of the controlled substances named above.

II. Analysis**A. Sufficiency of the Indictments**

[1] Defendant contends that the trial court lacked jurisdiction on three charges of felonious sale/delivery of a controlled substance because the indictments were facially invalid as they did not name controlled substances listed in Schedule III. We agree.

It is well settled that a felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged. *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996); *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). Identity of a controlled substance allegedly possessed constitutes such an essential element. *State v. Board*, 296 N.C. 652, 658-59, 252 S.E.2d 803, 807 (1979) (testimony that substance a special agent purchased was “MDA” was held insufficient evidence that defendant possessed and sold “3,4-methylenedioxymphetamine” as charged in bills of indictment). “An indictment is invalid where it fails to state some essential and necessary

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element of the offense of which the defendant is found guilty.” *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005) (citations and internal quotations omitted).

Here, the indictment in 10 CRS 60225 charged defendant with “unlawfully, willfully and feloniously [possessing] with the intent to manufacture, sell and/or deliver a controlled substance, to wit: **UNI-OXIDROL**, which is included in Schedule III of the North Carolina Controlled Substances Act” and also charged defendant with selling and/or delivering to “A. Simpson a controlled substance, to wit: **UNI-OXIDROL 50**, which is included in Schedule III of the North Carolina Controlled Substances Act.”

The indictment in 10 CRS 60232 charged defendant with possession with intent to sell or deliver a controlled substance, “to wit: **SUSTANON**, which is included in Schedule III of the North Carolina Controlled Substances Act.”

The indictment is 10 CRS 60233 charged defendant with possession with intent to sell or deliver a controlled substance, “to wit: **UNI-OXIDROL**, which is included in Schedule III of the North Carolina Controlled Substances Act.”

Defendant contends that because neither Uni-Oxidrol, Uni-Oxidrol 50, nor Sustanon are substances that are included in Schedule III of the North Carolina Controlled Substances Act, the indictments charging the above crimes are fatally flawed and the convictions stemming therefrom must be vacated. Defendant’s argument has merit.

In advancing his argument, defendant relies on this Court’s opinions in *Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412 (2005), *State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604 (2006), and *State v. LePage*, 204 N.C. App. 37, 693 S.E.2d 157 (2010).

In *Ledwell*, the indictment charging the defendant alleged that the defendant “did possess Methylenedioxyamphetamine (MDA), a controlled substance included in Schedule I of the North Carolina Controlled Substances Act.” *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414. However, this Court held that the indictment was facially invalid and vacated the defendant’s conviction because “the substance listed in [the] Defendant’s indictment does not appear in Schedule I of the North Carolina Controlled Substances Act.” *Id.* at 333, 614 S.E.2d at 415.

Similarly, in *Ahmadi-Turshizi*, the defendant was charged with three offenses for the possession, sale, and delivery of

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“methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act.” 175 N.C. App. at 785, 625 S.E.2d at 605. This Court noted that Schedule I outlined a long list of controlled substances by their specific chemical name, including the substance “3, 4—Methylenedioxymethamphetamine (MDMA).” *Id.* However, a substance simply called “methylenedioxymethamphetamine” was not listed. *Id.* Relying on *Ledwell*, this Court vacated the defendant’s convictions on the same basis, concluding that the indictment charging the defendant was fatally flawed because the substance named in the indictment was not listed in Schedule I of our Controlled Substances Act. *Id.* at 785-86, 625 S.E.2d at 605-06 (*holding* “when an indictment fails to list a controlled substance by its chemical name as it appears in Schedule I of North Carolina General Statutes, section 90-89, the indictment must fail”).

Finally, in *LePage*, the challenged indictments charged the defendant with certain crimes involving “BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]” 204 N.C. App. at 54, 693 S.E.2d at 168. Because “BENZODIAZEPINES” was not listed among any of the sixty-seven substances listed in Schedule IV, and because there existed derivatives of the benzodiazepine category of drugs that were not listed under Schedule IV, the *LePage* Court vacated the defendant’s convictions, holding: “We are bound by the principle established under *Ledwell* and *Ahmadi-Turshizi*, that when an indictment fails to list a controlled substance by its chemical name as it appears in [the relevant Schedule of the North Carolina Controlled Substances Act], the indictment must fail.” *Id.* at 54, 693 S.E.2d at 168 (alteration in original).

Here, neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are substances that are included in Schedule III of the North Carolina Controlled Substances Act. Further, none of these substances are considered trade names for other substances included in Schedule III. As such, we note that the State is misguided in arguing that this case is analogous to *State v. Newton*, 21 N.C. App. 384, 386, 204 S.E.2d 724, 725 (1974) (holding that because the substance named in the defendant’s indictment, Desoxyn, was a trade name for methamphetamine, which was the substance that the defendant was shown to have possessed and was likewise included in the Controlled Substances Act, there was no variance between the charge listed in the indictment and the proof).

This Court is similarly bound by the principles established under *Ledwell*, *Ahmadi-Turshizi*, and *LePage*. As a consequence, the

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challenged indictments must fail as they are fatally flawed. We vacate defendant's convictions resulting from the charges alleged in 10 CRS 60225, 60232, and 60233.

B. Sufficiency of the Evidence

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the sale and/or delivery charges in case numbers 10 CRS 60224, 10 CRS 60232, 10 CRS 60225, 10 CRS 60233, and 10 CRS 60234 based on his contention that there was a fatal variance between the indictments and the evidence produced during the State's case-in-chief. Specifically, defendant argues that no evidence was supplied during the State's case-in-chief that defendant sold controlled substances to "A. Simpson." We disagree. In the first issue, we vacated the convictions for 10 CRS 60232, 60225, and 60233. Therefore, we need only address defendant's argument in regards to 10 CRS 60224 and 60234.

"Where a sale is prohibited, it is necessary for a conviction to allege in the bill of indictment the name of the person to whom the sale was made, or that his name is unknown, unless some statute eliminates that requirement." *State v. Johnson*, 202 N.C. App. 765, 767-68, 690 S.E.2d 707, 709 (2010). Additionally, "the proof must conform to the allegations and establish a sale to the named person or state that the purchaser was in fact unknown." *Id.* at 768, 690 S.E.2d at 709. The intended purpose of describing a person by his or her name is to identify the person. *Id.*

In general, "a person may be designated in a legal proceeding by the name by which the person is commonly known, even though it may not constitute the person's 'true name.' Moreover, it is not necessary that the person be known as well by the one name as by the other, and it is sufficient if the person is known by both names." *Id.* at 768, 690 S.E.2d at 709. "Where different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury." *Id.* at 768-69, 690 S.E.2d at 709.

Defendant notes that the indictments allege that defendant "did sell and/or deliver to A. Simpson a controlled substance. . . ." (emphasis added). However, during trial Mr. Simpson testified that he was named "Cedrick Simpson," not "A. Simpson." Because of this discrepancy, on appeal defendant contends that his convictions must be vacated because "there was no evidence that [defendant] sold or delivered a controlled substance to A. Simpson." We are not persuaded.

Here, the indictments name "A. Simpson" as the purchaser of the controlled substances, but Mr. Simpson testified that his name is "Cedric

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[242 N.C. App. 236 (2015)]

Simpson.” However, neither during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson’s identity or prejudiced by the fact that the indictment identified “A. Simpson” as the purchaser instead of “Cedric Simpson” or “C. Simpson.” In fact, defendant testified that he had seen Cedric Simpson daily for fifteen years at the gym. The evidence suggests that defendant had no question as to Mr. Simpson’s identity. The mere fact that the indictment named “A. Simpson” as the purchaser of the controlled substances is insufficient to require that defendant’s convictions be vacated when there is no evidence of prejudice, fraud, or misrepresentation. *See id.* at 768, 690 S.E.2d at 709. Again, “[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide.” *Id.* at 768-69, 690 S.E.2d at 709; *see also State v. Walls*, 4 N.C. App. 661, 167 S.E.2d 547 (1969). Here, the question of the purchaser’s identity was resolved by the jury. “The indictment and the evidence sufficiently established the identity of the purchaser to meet constitutional standards and requirements of proof.” *Johnson*, 202 N.C. App. at 769, 690 S.E.2d at 709. Accordingly, we hold that the trial court did not err in denying defendant’s motion to dismiss.

Vacated, in part; no error, in part; new sentencing hearing.

Judges GEER and DILLON concur.

CAROLINE ANNE THOMAS, PLAINTIFF

v.

KEVIN S. WILLIAMS, DEFENDANT

No. COA15-37

Filed 7 July 2015

1. Domestic Violence—protective order—dating relationship—less than three weeks

In its domestic violence protective order requiring that defendant have no contact with plaintiff and surrender his firearms for a year, the trial court did not err by concluding that defendant and plaintiff had been in a “dating relationship” for purposes of North Carolina’s Domestic Violence Act. Even though their relationship had lasted less than three weeks, the facts of this case satisfied the statutory definition.

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2. Domestic Violence—protective order—fear of continued harassment

In its domestic violence protective order requiring that defendant have no contact with plaintiff and surrender his firearms for a year, the trial court did not err by finding that defendant placed plaintiff “in fear of continued harassment that rises to such a level as to inflict substantial emotional distress.” The evidence showed that plaintiff was afraid of defendant; defendant repeatedly contacted plaintiff over an extended period of time after she told him to stop; and defendant left plaintiff a threatening voice message after he was arrested.

Appeal by Defendant from order entered 4 August 2014 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 1 June 2015.

No brief filed for Plaintiff-Appellee.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for Defendant-Appellant.

McGEE, Chief Judge.

Kevin S. Williams (“Defendant”) appeals from a domestic violence protective order (“DVPO”) entered 4 August 2014. Defendant contends that the trial court erred by concluding (1) that Defendant and Caroline Anne Thomas (“Plaintiff”) had a “dating relationship” and (2) that Defendant had committed acts of domestic violence against Plaintiff by repeatedly contacting Plaintiff after she ended their relationship, thereby placing Plaintiff in fear of continued harassment. We disagree.

I. Background

Plaintiff and Defendant met in early April 2014 on a greenway in Charlotte where Defendant regularly volunteered with the Charlotte-Mecklenburg Park and Recreation Department. Plaintiff and Defendant dated for less than three weeks. Plaintiff attempted to end her relationship with Defendant on 1 May 2014 and asked Defendant to stop contacting her. However, Defendant continued to contact Plaintiff via phone calls, voicemails, and text messages. In response, Plaintiff filed a police report with the Charlotte-Mecklenburg Police Department on 17 May 2014. Detective Melissa Wright (“Detective Wright”) spoke to Defendant on 23 May 2014 and directed Defendant to stop contacting Plaintiff. Defendant, however, continued to contact Plaintiff.

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Plaintiff filed a verified complaint and motion for a domestic violence protective order on 30 May 2014 (“Plaintiff’s verified complaint”). Defendant was served with notice of a hearing on Plaintiff’s verified complaint on 2 June 2014. Plaintiff’s verified complaint recounted Defendant’s repeated attempts to contact her and stated, in part, that Plaintiff ended their relationship because Defendant “said and did controlling things” and that Plaintiff was “afraid” of him. Detective Wright also obtained a warrant to arrest Defendant for stalking on or around 5 June 2014 and arrested Defendant. After Defendant was released from jail, he again contacted Plaintiff and, in a voicemail, reportedly stated: “[Y]ou put me through hell. Now it’s your turn.”

A hearing on Plaintiff’s verified complaint was held on 4 August 2014. Plaintiff testified she ended her relationship with Defendant because she was “very afraid” of him and that Defendant had called her twelve times, left six voicemail messages, and texted her ten times between 1 May 2014 and the day of the hearing, with most of those contacts occurring in May 2014. Plaintiff further testified that Defendant’s continued contacts had “severely affected [her] new job that [she had] just [taken] when all this started happening. [She] had to leave work several times. It[] [has] caused [her] a lot of emotional distress. [She has had] trouble sleeping. It [gave her] an upset stomach. [She also] purposely avoid[ed] the Greenway [now.]”

In a DVPO entered 4 August 2014, the trial court concluded that Plaintiff and Defendant had been in a “dating relationship” and found that, after Plaintiff tried to end the relationship, Defendant “continued to initiate contact by telephone and [text] message for no legitimate purpose except to torment Plaintiff.” The trial court further found that Defendant’s conduct had caused Plaintiff to “suffer[] substantial emotional distress in that she suffers [from] anxiety, sleeplessness[,] and has altered her daily living activities.” The trial court concluded that Defendant had “committed acts of domestic violence against” Plaintiff in that he “placed [Plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress.” Defendant was ordered, *inter alia*, to have no contact with Plaintiff and to surrender his firearms for one year. Defendant appeals.

II. Standard of Review

When the trial court sits without a jury regarding a DVPO,

the standard of review on appeal is whether there was competent evidence to support the trial court’s findings

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of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (citation omitted). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citation omitted).

III. "Dating Relationship"

[1] Defendant challenges the applicability of North Carolina's Domestic Violence Act ("the Act") to the facts in the present case. *See generally* N.C. Gen. Stat. § 50B-1 *et seq.* (2013). Specifically, Defendant contends the trial court erred by concluding that he and Plaintiff were in a "dating relationship" for the purposes of the Act, primarily because their relationship lasted for less than three weeks. We disagree.

N.C.G.S. § 50B-1 limits the definition of "domestic violence[.]" in relevant part, to the commission of certain acts "by a person with whom the aggrieved party has or has had a personal relationship[.]"

For purposes of this section, the term "personal relationship" means a relationship wherein the parties involved:

...

- (6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

N.C.G.S. § 50B-1(b). N.C.G.S. § 50B-1(b)(6) has rarely been interpreted by our appellate Courts. However, "[i]n interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning[.]" *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *In re N.T.*,

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214 N.C. App. 136, 141, 715 S.E.2d 183, 186 (2011) (citations and quotation marks omitted).

We first begin by examining what a “dating relationship” is not. Specifically, under N.C.G.S. § 50B-1(b)(6), a “casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.” The term “acquaintance” means “a relationship less intimate than friendship.” Webster’s II New College Dictionary 10 (3d ed. 2005). The term “fraternize” means to “associate with others in a congenial or brotherly way.” *Id.* at 453. Read together – and in conjunction with the modifiers “casual acquaintance” and “ordinary fraternization” – this language appears to expressly exclude only the least intimate of personal relationships from the definition of “dating relationship” in N.C.G.S. § 50B-1(b)(6). (emphasis added).

However, N.C.G.S. § 50B-1(b)(6) also provides that a “dating relationship” is one in which the parties are “romantically involved over time and on a continuous basis during the course of the relationship.” (emphasis added). Provided that a relationship is not a “casual acquaintance” or results merely from “ordinary fraternization[.]” and provided that this relationship is “romantic” in nature “on a continuous basis” and for a sufficient period of time, then it would appear to constitute a “dating relationship” under N.C.G.S. § 50B-1(b)(6). The primary question this Court must resolve is how long a “continuous” “romantic” relationship must exist in order for it to exist “over time[.]”

As a preliminary matter, we do not believe that the term “over time” is unambiguous. Indeed, this Court has used “over time” to describe everything from the span of minutes or hours, *see State v. Dahlquist*, __ N.C. App. __, __, 752 S.E.2d 665, 668 (2013), *disc. review denied*, 367 N.C. 331, 755 S.E.2d 614 (2014), to months or years, *see In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 395 (2005). “[W]here the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.” *Frye Reg’l Med. Ctr.*, 350 N.C. at 45, 510 S.E.2d at 163. If the statute also is “remedial” in nature, the “statute must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained,” *O & M Indus. v. Smith Eng’r Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (emphasis added) (citation and quotation marks omitted), as well as to “bring[] within it all cases fairly falling within its intended scope.” *Burgess v. Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979).

“A remedial statute . . . is for the purpose of adjusting the rights of the parties as between themselves in respect to the wrong alleged.”

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Martin & Loftis Clearing & Grading, Inc. v. Saieed Constr. Sys. Corp., 168 N.C. App. 542, 546, 608 S.E.2d 124, 127 (2005) (citation and quotation marks omitted). N.C. Gen. Stat. § 50B-3 (2013) defines the kinds of relief available to aggrieved parties under the Act. This section provides that “[i]f the [trial] court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence” and it authorizes a litany of enumerated forms of relief in order to effectuate that end. *See id.* In essence, N.C.G.S. § 50B-3 “requires the state to engage in prompt remedial action adverse to an individual[s] [property or liberty] interest[s]” in order to further “the legitimate state interest in immediately and effectively protecting victims of domestic violence[.]” *Cf. State v. Poole*, __ N.C. App. __, __, 745 S.E.2d 26, 37, *disc. review denied*, 367 N.C. 255, 749 S.E.2d 885 (2013) (emphasis added) (citation and quotation marks omitted) (discussing *ex parte* protective orders under N.C. Gen. Stat. §§ 50B-2(c) and 50B-3.1 (2013)). Moreover, the term “over time” in N.C.G.S. § 50B-1(b)(6) is used to define the General Assembly’s “intended scope[.]” *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251, of who may obtain relief under N.C.G.S. § 50B-3. Therefore, to the extent that the term “over time” in N.C.G.S. § 50B-1(b)(6) is ambiguous, it will be “construed broadly” by this Court. *See O & M Indus.*, 360 N.C. at 268, 624 S.E.2d at 348; *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251.

As an additional matter of statutory construction, we also note that “the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute.” *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251. Given that the last sentence in N.C.G.S. § 50B-1(b)(6), regarding “casual acquaintance[s]” and “ordinary fraternization[.]” appears to expressly exclude from the definition of “dating relationship” only the least intimate of personal relationships, we do not believe that the term “over time” – construed broadly – categorically precludes a short-term romantic relationship, such as the one in the present case, from *ever* being considered a “dating relationship” for the purpose of N.C.G.S. § 50B-1(b)(6). Instead, we agree with courts in other jurisdictions that the question of what constitutes the “minimum conduct to establish a dating relationship . . . is necessarily fact sensitive and thus warrants a ‘factor approach’ rather than a ‘definitional approach[.]’”¹ *Andrews v. Rutherford*, 832 A.2d 379, 382–84, 387

1. For similar reasons, to the extent that there may be ambiguities in determining whether a relationship was sufficiently “romantic” in nature or “continuous” for the purposes of N.C.G.S. § 50B-1(b)(6), we believe these ambiguities are also appropriately addressed through a factor approach.

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(Ch. Div. 2003) (noting that Vermont, Massachusetts, and Washington also use a factor approach); *accord Brand v. State*, 960 So. 2d 748, 750–52 (Ala. Crim. App. 2006) (adopting the factor approach used in *Andrews*).

The court in *Andrews* provided six non-exhaustive factors that courts should consider when determining if a “dating relationship” existed – factors we believe are informative in the present case:

1. Was there a minimal social interpersonal bonding of the parties over and above [that of] mere casual [acquaintances or ordinary] fraternization?
2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
3. What were the nature and frequency of the parties’ interactions?
4. What were the parties’ ongoing expectations with respect to the relationship, either individually or jointly?
5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?
6. Are there any other reasons unique to the case that support or detract from a finding that a “dating relationship” exists?

Andrews, 832 A.2d at 383–84.

In the present case, under the first factor in *Andrews*, the uncontested evidence shows that Plaintiff and Defendant dated each other for less than three weeks, which appears to exceed the “minimal social interpersonal bonding” of casual acquaintances or of contacts through ordinary fraternization. Under the second factor, Plaintiff testified that she ended her relationship with Defendant after less than three weeks because she was “very afraid” of Defendant and instructed Defendant to never contact her again, at which point Defendant began contacting Plaintiff repeatedly and over a prolonged period of time. There is little evidence in the record regarding the third, fourth, and fifth factors, but we do not believe that this is necessarily dispositive. As for the sixth factor, we find it notable that Defendant felt strongly enough about his relationship with Plaintiff to extend their two-to-three-week-long relationship into essentially a two-to-three-month-long breakup by continuing to contact Plaintiff in direct contravention of Plaintiff’s

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and Detective Wright's demands that he cease.² After reviewing these factors, we believe there was sufficient competent evidence to establish that the relationship between Plaintiff and Defendant fit within the General Assembly's intended definition of "dating relationship" and we find no error by the trial court.

IV. Fear of Continued Harassment

[2] Defendant contends there was insufficient evidence for the trial court to find that Defendant "placed [Plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." See N.C. Gen. Stat. § 50B-1(a)(2) (2013). Specifically, Defendant argues that, "[e]xcept for one voicemail that Defendant left after he was arrested, Plaintiff failed to present evidence as to the nature of [Defendant's] voicemails or texts, thereby failing to show Defendant's intent was to harass Plaintiff."

As a preliminary matter, "[t]he plain language of [N.C.G.S. §] 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred." *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999). Therefore, N.C.G.S. § 50B-1 does not require Plaintiff to establish that Defendant "intended" to do anything. Instead,

[d]omestic violence means the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship . . . :

. . .

- (2) Placing the aggrieved party . . . in fear of . . . continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]

N.C.G.S. § 50B-1(a) (emphasis added). N.C. Gen. Stat. § 14-277.3A (2013) provides that "harassment" is

[k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or

2. Defendant even suggests in his brief before this Court that these repeated, unwelcome attempts to contact Plaintiff were done "with the hopes of continuing the [parties'] 'relationship.'"

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voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

The evidence presented at the hearing tended to show that (1) Plaintiff and Defendant entered into a romantic relationship; (2) within several weeks, Plaintiff ended the relationship, reportedly because she was “very afraid” of Defendant, and she expressly instructed Defendant to not contact her again; (3) Defendant nevertheless proceeded to contact Plaintiff repeatedly and over a prolonged period of time, even after Plaintiff filed a domestic violence complaint against him and Detective Wright directed him to stop contacting Plaintiff; (4) after Defendant was arrested for continuing to contact Plaintiff, he left a voicemail on Plaintiff’s phone and stated: “[Y]ou put me through hell. Now it’s your turn[;]” and (5) Plaintiff consequently suffered from anxiety and sleeplessness and altered her daily living activities. Although Plaintiff testified only about the specific contents of one voicemail during the hearing – which Defendant acknowledges was “hostile” in nature – when combined with the facts described above, there was sufficient competent evidence for the trial court to find that Defendant placed Plaintiff in fear of continued harassment and caused her substantial emotional distress, and this finding supports the trial court’s ultimate conclusion that Defendant committed acts of domestic violence against Plaintiff. *See* N.C.G.S. § 50B-1(a)(2). Defendant’s argument is without merit.

AFFIRMED.

Judges GEER and TYSON concur.

UNITED CMTY. BANK v. WOLFE

[242 N.C. App. 245 (2015)]

UNITED COMMUNITY BANK (GEORGIA), PLAINTIFF

v.

THOMAS L. WOLFE AND BARBARA J. WOLFE, TRUSTEES OF THE THOMAS L. WOLFE
AND BARBARA J. WOLFE IRREVOCABLE TRUST, THOMAS L. WOLFE, INDIVIDUALLY
AND BARBARA J. WOLFE, INDIVIDUALLY, DEFENDANTS

No. COA14-1309

Filed 7 July 2015

Mortgages and Deeds of Trust—foreclosure—deficiency—value of property

Summary judgment for the bank was inappropriate in an action to recover the deficiency on a mortgage after a foreclosure at which the bank bought the property and defendants claimed the relief offered in N.C.G.S. § 45-21.36. A debtor who asserts the statutory defense under that statute bears the burden of forecasting evidence to show that there is a genuine issue of fact about the value of the property. Here, defendants relied on their own joint affidavit; the owner's opinion of value was competent to prove the property's value in North Carolina.

Appeal by Defendants from order entered 30 June 2014 by Judge Marvin P. Pope, Jr., in Transylvania County Superior Court. Heard in the Court of Appeals 7 April 2015.

Van Winkle, Buck, Wall, Starnes, and Davis, P.A., by Esther E. Manheimer and Lynn D. Moffa, for the Plaintiff-Appellee.

Donald H. Barton, P.C., by Donald H. Barton, for the Defendants-Appellants.

DILLON, Judge.

Thomas L. Wolfe and Barbara L. Wolfe (“Defendants”) appeal from the trial court’s order granting summary judgment in favor of United Community Bank (Georgia) (the “Bank”). For the following reasons, we reverse and remand.

I. Background

In 2008, the Bank loaned Defendants \$350,000.00 to purchase certain real property and secured the loan with a deed of trust on said property.

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Sometime later, Defendants defaulted on the loan. The Bank foreclosed on the deed of trust, and the foreclosure sale was held in August of 2013. The Bank submitted the high bid of \$275,000.00 at the foreclosure sale and, as a result, was subsequently deeded the property. The net proceeds realized from the foreclosure sale (\$275,000.00 minus expenses) were not adequate to satisfy the amount outstanding on the note (over \$325,000.00), resulting in a deficiency of over \$50,000.00.

In November of 2013, the Bank brought this action for the deficiency, and for attorneys' fees, costs, and interest. The Bank moved for summary judgment, which was allowed by the trial court following a hearing on the matter. Specifically, the trial court awarded \$57,737.74 representing the deficiency, interest from the date of the judgment, attorneys' fees in the amount of \$8,660.66, and the costs of the action. Defendants entered notice of appeal.

II. Analysis

This action involves the application of N.C. Gen. Stat. § 45-21.36, which provides certain obligors a defense or offset brought by their lender to recover the deficiency following a foreclosure sale. Typically, following a foreclosure sale, the amount of the debt is deemed reduced by the amount of the net proceeds realized from said sale, *see* N.C. Gen. Stat. § 45-21.31(a)(4) (2013), and the obligors are then only liable for the remaining debt, *i.e.*, the deficiency. However, this general rule is abrogated by N.C. Gen. Stat. § 45-21.36 in situations where it is the foreclosing creditor (which in this case is the Bank), and not some third party, who is the high bidder at the foreclosure sale. *Branch Banking and Trust Co. v. Smith*, ___ N.C. App. ___, ___, 769 S.E.2d 638, 640 (2015). Specifically, N.C. Gen. Stat. § 45-21.36 provides two alternate forms of defensive relief in deficiency actions brought by the lender who was also the high bidder at foreclosure whereby the liability of certain obligors for the deficiency may be eliminated or reduced: First, the liability of certain obligors for the deficiency may be eliminated entirely where it is shown "that the collateral was [actually] fairly worth the amount of the entire debt[.]" notwithstanding that the creditor's successful bid at foreclosure was less. *Id.* Second (and alternatively), though the value of the collateral may not have been as high as the amount of the debt owed, the liability of certain obligors for the deficiency may still be reduced "by way of offset" where it is shown that the creditor's winning foreclosure bid was "substantially less" than the collateral's true value.¹ *Id.*

1. By way of illustration, if a lender forecloses on collateral securing a \$1 million loan and the lender purchases the collateral at the sale for \$600,000, the lender would

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In the present case, the trial court granted summary judgment for the Bank, effectively concluding that Defendants failed to meet their burden of demonstrating the existence of a material fact as to their defense under N.C. Gen. Stat. § 45-21.36. Defendants argue on appeal that they did meet their burden; and, therefore, summary judgment was inappropriate. We agree.

We review a trial court's order granting summary judgment *de novo*. *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014).

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2014) (emphasis added).

Where a debtor asserts the statutory defense under N.C. Gen. Stat. § 45-21.36 by contending *either* that the property was worth the amount of the outstanding debt or the amount of the Bank's bid was “substantially less” than the property's true value, the collateral's true value is generally a *material fact*. See *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 763, 394 S.E.2d 294, 296 (1990); N.C. Gen. Stat. § 45-21.36 (2013).

The debtor bears the burden at summary judgment to forecast evidence to show that there is a *genuine issue* regarding this material fact. See *Lexington State Bank v. Miller*, 137 N.C. App. 748, 751-52, 529 S.E.2d 454, 455-56 (2000).

Our Supreme Court has held that an issue is *genuine* where it “is one that can be maintained by substantial evidence[.]” *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000), and has defined “substantial evidence” as “relevant evidence which a reasonable mind . . . could accept as adequate to support a conclusion[.]” *In re Gordon*, 352 N.C. 349, 352, 531 S.E.2d 795, 797 (2000). Where Defendants rely on an affidavit to

normally have a valid deficiency claim for \$400,000 against the obligors. However, the obligors to which N.C. Gen. Stat. § 45-21.36 applies could “defeat” the claim by way of a “defense” by showing that the collateral was worth at least \$1 million (the full loan amount). Alternatively, those obligors could “reduce” their liability by way of an “offset” by showing that the \$600,000 bid was “substantially less” than the actual value of the collateral. For example, if the collateral was shown to be worth \$850,000 and if \$600,000 was determined to be “substantially less” than \$850,000, then those obligors' liability for the deficiency would be only \$150,000, rather than \$400,000.00.

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satisfy this burden, Rule 56 of our Rules of Civil Procedure requires that the affidavit “shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” N.C. Gen. Stat. § 1A-1, Rule 56(e) (2014).

In the present case, Defendants relied on their own joint affidavit, stating that it was “made on [Defendants’] personal knowledge” and that Defendants “verily believe[] that the [property] was at the time of the [foreclosure] sale fairly worth the amount of the debt it secured.” Based on holdings of our Supreme Court, we are compelled to conclude that Defendants, through their affidavit, met their burden of demonstrating a *genuine* issue of fact that their property was “fairly worth” the amount of their debt.

Specifically, where the value of real property is a factual issue in a case, our Supreme Court has repeatedly held that the owner’s opinion of value is competent to prove the property’s value. *See, e.g., Dep’t of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006) (recognizing that “[i]n most instances, landowners seek to prove fair market value through the testimony of the owners themselves and that of appraisers offered as expert witnesses”). Furthermore, while the proponent of opinion evidence generally has the burden of laying a foundation as to the basis of the opinion being offered, our Supreme Court has repeatedly held that the owner of real estate is *presumed* to be competent to give his opinion as to its value, expressly *rejecting* that “the owner, just as any other witness, must establish his qualifications before expressing his opinion of [] value[.]” *North Carolina State Highway Comm’n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974) (holding that the owner “is deemed . . . to have a reasonably good idea of what [his property] is worth”). As Justice (later Chief Justice) Susie Sharp explained in *Helderman*:

Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner. . . . The weight of his testimony is for the jury[.]

Id. See also Harrelson v. Gooden, 229 N.C. 654, 656-57, 50 S.E.2d 901, 903 (1948); *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 341-42, 315 S.E.2d 311, 313 (1984); *Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007) (recognizing that “[c]ourts

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indulge a common-law presumption that a property owner is competent to testify on the value of his own property").²

In the present case, we are required to regard Defendants' affidavit indulgently. *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (directing that "the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized"). Based on a fair reading of Defendants' affidavit, there was evidence at summary judgment that Defendants had personal knowledge as to the amount they owed on their loan at the time of the foreclosure sale (an amount which was not in dispute) and that based on their personal knowledge about their property, it was their opinion that the property was worth the amount they owed on the loan. There is nothing in their affidavit or otherwise which affirmatively shows that Defendants did not know the market value of their property. Therefore, we must conclude that Defendants' opinion that their property was worth the amount of the debt is substantial evidence from which a jury could conclude that Defendants' property, indeed, was worth the amount that was owed, a finding which would eliminate Defendants' liability for the deficiency pursuant to N.C. Gen. Stat. § 45-21.36. Accordingly, Defendants have met their burden of creating a *genuine* issue of fact that their property was "fairly worth the amount of the debt[.]" and summary judgment was improper. See *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 101, 392 S.E.2d 410, 413 (1990) (reversing summary judgment for the lender, holding that the debtor had created a genuine issue of fact regarding his defense under N.C. Gen. Stat. § 45-21.36 by producing a single affidavit from a competent witness stating his opinion as to the value of the property, which was more than the amount of the debt).

The Bank cites *Lexington State Bank*, *supra*, in support of its position that summary judgment was proper in this case. However, *Lexington State Bank* is distinguishable from the present case. In *Lexington State Bank*, we held that the debtor claiming that there is a genuine issue of fact that the amount bid by the lender at foreclosure was "substantially less" than the true value of the property fails to meet his burden at summary judgment where the affidavit he relies upon merely states that the property was worth "substantially more" than the amount paid by the lender at foreclosure. 137 N.C. App. at 753-54, 529 S.E.2d at 457.

2. Note that an owner's opinion is not competent where it is shown that the owner's opinion is not really his own but is based entirely on the opinion of others. See *Scott v. Smith*, 21 N.C. App. 520, 522, 204 S.E.2d 917, 919 (1974).

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Specifically, we held that the affidavit failed to “set forth [any] *specific facts* with respect to [the property’s value.]” *Id.* at 753, 529 S.E.2d at 457 (emphasis added).

However, unlike in *Lexington State Bank*, Defendants here are not contending that the property was worth “substantially more” than the amount bid by the Bank, but rather that the property was worth a specific amount, the amount of their debt. Further, unlike in *Lexington State Bank*, Defendants here have stated in their affidavit “specific facts” regarding the value of their property; to wit, a competent opinion that the property was worth a certain dollar amount. We recognize that the better practice would have been for Defendants’ affidavit to state an opinion of value *in the form of a specific dollar amount or minimum dollar amount*, whereas here Defendants merely state that the property was worth “the amount of the debt.” However, Defendants’ statement is sufficiently equivalent to stating a specific dollar amount since the “amount of the debt” at the time of the foreclosure was not in dispute, Defendants essentially state that they have personal knowledge of the amount of the loan, and there is nothing to indicate that Defendants – as the borrowers on the loan – did not know the amount they owed.

III. Conclusion

Defendants, by way of defense pursuant to N.C. Gen. Stat. § 45-21.36, contend that their property was worth the amount of the debt they owed the Bank at the time of the foreclosure. The Bank put forth strong evidence to suggest otherwise. For instance, the Bank’s appraiser valued the property at the Bank’s foreclosure bid (far below the debt amount) and the Bank ultimately sold the property for far less than its bid. However, Defendants put forth evidence regarding the value of the property which is at odds with the Bank’s evidence. It certainly could be argued that Defendants’ evidence is much weaker – for example, there is no indication that Defendants are licensed appraisers, and they fail to lay any foundation in their affidavit to support their opinion of value. However, the jurisprudence of our Supreme Court compels us to conclude that Defendants’ affidavit constitutes substantial evidence on the issue, and it is not for the courts to weigh the evidence. Therefore, summary judgment was inappropriate. Accordingly, we reverse the decision of the trial court and remand the matter for further proceedings.

REVERSED AND REMANDED.

Judges ELMORE and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JULY 2015)

BRANCH BANKING & TR. CO. v. SIMPSON No. 14-1160	Forsyth (12CVD3462)	Affirmed
BROCK v. JOHNSON BREEDERS, INC. No. 14-914	Duplin (12CVS818)	Affirmed
BROWNSTEAD v. BROWNSTEAD No. 14-1316	Mecklenburg (07CVD6452)	Affirmed
BYRD v. WATSON No. 14-1137	Durham (12CVD5695)	Reversed and Remanded
GARRETT v. BURRIS No. 14-1257	Mecklenburg (13CVS12992)	Affirmed
HANCE v. FIRST CITIZENS BANK & TR. CO. No. 14-807	Union (12CVS2200) (12CVS2200)	Affirmed
IN RE D.A.J. No. 15-41	Wake (12JT595) (13JT12)	Affirmed
IN RE G.B. No. 14-1207	Guilford (14JA142-143)	Remanded for further proceedings.
IN RE GUTOWSKI No. 14-881	Union (12SP174)	Dismissed. Motion to Remand Denied.
IN RE I.E.H. No. 15-45	Forsyth (14JB16)	Affirmed
IN RE J.G.R. No. 15-56	Wilkes (12JT50-52)	Affirmed
IN RE J.J. No. 15-143	Robeson (02JT185)	Affirmed
IN RE N.T. No. 14-1292	Forsyth (01JT56) (08JT29-30)	Affirmed
IN RE S.D. No. 14-1363	Cumberland (13JA80) (13JA81)	Affirmed

IN RE T.F.L. No. 15-114	Wilkes (12JT154-156)	Affirmed
KELLY v. RAY OF LIGHT HOMES, LLC No. 14-1029	N.C. Industrial Commission (W85477)	Affirmed in part, reversed in part.
KOHN v. FIRSTHEALTH OF THE CAROLINAS, INC. No. 14-1210	Moore (13CVS1147)	Affirmed
OVERTON v. OVERTON No. 14-1269	Pasquotank (12CVD447)	Affirmed
PORTER v. BEARCAT, INC. No. 15-128	N.C. Industrial Commission (W46200)	Affirmed
RICHMOND v. CITY OF ASHEVILLE No. 15-174	Buncombe (13CVS1358)	Affirmed
SHALLOTTE PARTNERS, LLC v. BERKADIA COM. MORTG., LLC No. 15-89	Mecklenburg (14CVS3030)	REVERSED in part; DISMISSED in part
SIMON v. MOORE No. 15-157	New Hanover (13CVS887)	Affirmed
SNOKE v. SNOKE No. 14-1098	Forsyth (10CVD2439)	Affirmed in part, remanded in part
STATE v. ARMSTRONG No. 14-765	Gaston (11CRS10085) (13CRS10396)	No Error
STATE v. COLLINGTON No. 14-1244	Transylvania (12CRS52047) (13CRS463)	NO PLAIN ERROR
STATE v. DAVIS No. 14-1358	Buncombe (13CRS262) (13CRS52691)	No Error
STATE v. FORD No. 15-80	Forsyth (13CRS61650)	No Error
STATE v. GIBBS No. 14-1052	Carteret (13CRS2595-2599) (13CRS3068-3070) (13CRS52201)	No Error

STATE v. LOVE No. 14-1330	Scotland (11CRS52415) (13CRS635)	No Prejudicial Error
STATE v. MARTIN No. 13-956-2	Halifax (12CRS1797) (12CRS51587)	No Error
STATE v. MARTIN No. 14-1375	Pitt (12CRS57098) (12CRS57112-21)	No prejudicial error
STATE v. MUHAMMAD No. 14-1350	Forsyth (13CRS50718) (13CRS50721) (13CRS58824-25)	No Error
STATE v. PERRY No. 14-1009	Duplin (10CRS52030)	Affirmed
STATE v. SORRELL No. 14-986	Wake (13CRS214020)	No Error
STATE v. SULLIVAN No. 15-76	Cleveland (10CRS53485)	Dismissed
STATE v. TAYLOR No. 14-1402	Wake (13CRS208704)	No Error
STATE v. WILKERSON No. 15-95	Durham (10CRS56344)	No Prejudicial Error in Part; Remanded in Part
WATERS v. PEAKS No. 15-36	Beaufort (13CVS185)	Affirmed in part; and Remanded in Part

BUILDERS MUT. INS. CO. v. DOUG BESAW ENTERS., INC.

[242 N.C. App. 254 (2015)]

BUILDERS MUTUAL INSURANCE COMPANY, PLAINTIFF

v.

DOUG BESAW ENTERPRISES, INC., DEFENDANT

No. COA14-1343

Filed 21 July 2015

1. Civil Procedure—service—alias and pluries summons—exercise of due diligence

In an action for breach of contract and unjust enrichment, the trial court did not err by denying defendant's motion to set aside the default judgment. Pursuant to Rule of Civil Procedure 4(e), after plaintiff's summons sent to defendant's registered office was returned undeliverable, plaintiff served an alias and pluries summons on the Secretary of State. The Court of Appeals disagreed with defendant's argument that plaintiff failed to exercise due diligence in violation of Rule 4.

2. Civil Procedure—service—alias and pluries summons—Secretary of State

In an action for breach of contract and unjust enrichment, the trial court did not err by denying defendant's motion to set aside the default judgment due to the Secretary of State mailing the alias and pluries summons to defendant's registered address rather than defendant's principal address. Service was effective when the alias and pluries summons was served on the Secretary of State.

3. Appeal and Error—argument without merit—conceded by appellant

Where defendant conceded that an argument brought forth on appeal was without merit, the Court of Appeals dismissed the argument.

Appeal by defendant from orders entered 8 July 2014 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 21 April 2015.

The Stuart Law Firm, PLLC, by Catherine R. Stuart and Theresa S. Dew, for plaintiff-appellee.

Law Offices of T. Greg Doucette PLLC, by T. Greg Doucette, for defendant-appellant.

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BRYANT, Judge.

Where an alias and pluries summons was properly served upon the Secretary of State, service as to defendant was effective. Where defendant concedes that an argument brought forth on appeal is without merit, we dismiss that argument.

Defendant Doug Besaw Enterprises, Inc., is a residential electrical contractor who contracted with plaintiff Builders Mutual Insurance Company for worker's compensation insurance. After defendant failed to pay plaintiff for insurance premiums incurred, plaintiff filed suit against defendant on 16 September 2013 for breach of contract and unjust enrichment. Plaintiff sent a summons to defendant's registered office via certified mail, but the summons was returned as undeliverable.

On 17 January 2014, plaintiff sent an alias and pluries summons to the North Carolina Secretary of State. The Secretary of State's Office forwarded the summons to defendant's registered office, but the summons was again returned as undeliverable.

On 10 March 2014, plaintiff moved for and received an entry of default and default judgment against defendant. A writ of execution freezing the funds in defendant's bank accounts was issued and, shortly thereafter, plaintiff filed a motion to release defendant's bank account funds.

In June 2014, defendant filed a notice of appearance, followed by a motion to set aside the entry of default and default judgment. After a hearing, the trial court entered an order on 8 July denying defendant's motion to set aside the entry of default and default judgment. That same day, the trial court entered a second order granting plaintiff's motion to release defendant's bank account funds. Defendant appeals.

On appeal, defendant raises four issues as to whether the trial court erred in (I) denying defendant's motion to set aside the default judgment; (II) finding personal jurisdiction over defendant; (III) granting plaintiff's motion to release funds; and (IV) admitting evidence offered by plaintiff.

Motion to Set Aside the Default Judgment Based on Invalid Service

Defendant argues that the trial court erred in denying his motion to set aside the default judgment pursuant to Rule 60(b) of our North Carolina Rules of Civil Procedure and granting plaintiff's motion to release funds. We disagree.

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“A default judgment may be set aside under Rule 60(b)[] only upon a showing that: (1) extraordinary circumstances were responsible for the failure to appear, and (2) justice demands that relief.” *Advanced Wall Sys., Inc. v. Highlande Builders, LLC*, 167 N.C. App. 630, 634, 605 S.E.2d 728, 731 (2004) (citing *Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987)). “The decision to grant this rule’s exceptional relief is within the trial court’s discretion.” *Id.* “Because this [C]ourt cannot substitute what it consider[s] to be its own better judgment for a discretionary ruling of a trial court, we may not overturn the judge’s ruling unless it was manifestly unsupported by reason.” *Id.* (citations and quotations omitted).

[1] Defendant first contends the trial court erred in denying his motion to set aside the default judgment because plaintiff failed to exercise due diligence pursuant to Rule 4 in serving defendant with the summons. Specifically, defendant argues that because plaintiff’s summons “lay dormant from 16 December 2013 until the alias and pluries summons was issued on 17 January 2014[,]” plaintiff had to re-serve the summons on defendant before serving it on the Secretary of State.

Pursuant to Rule 4 of our Rules of Civil Procedure,

(d) When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension: . . .

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

. . .

(e) When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. *Thereafter, alias or pluries summons may issue . . . but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.*

N.C. Gen. Stat. § 1A-1, Rule 4(d)-(e) (2014) (emphasis added).

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Here, plaintiff filed its complaint and summons against defendant on 16 September 2013. After the summons was returned to plaintiff as undeliverable, plaintiff waited until 17 January 2014 to serve an alias and pluries summons on the Secretary of State. As such, pursuant to Rule 4(e), the alias and pluries summons commenced a new action when it was issued on 17 January 2014. *See id.* § 1A-1, Rule 4(e) (where an alias and pluries summons is commenced after the conclusion of the 90 day period specified in Rule 4(d), “the action shall be deemed to have commenced on the date of such issuance or endorsement.”). Defendant’s contention that plaintiff’s summons violated Rule 4 is, therefore, overruled.

[2] Defendant next argues that even if “Plaintiff had exercised due diligence prior to serving the Secretary of State, the Secretary of State’s independent error in mailing the lawsuit documents to the wrong address invalidated the attempted service of process.”

Pursuant to North Carolina General Statutes, section 55D-33,

[w]hen an entity required to maintain a registered office and registered agent under G.S. 55D-30 fails to appoint or maintain a registered agent in this State, or when its registered agent cannot with due diligence be found at the registered office, . . . the Secretary of State becomes an agent of the entity upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand is made by delivering to and leaving with the Secretary of State . . . copies of the process, notice or demand and the applicable fee. In the event any such process, notice or demand is served on the Secretary of State in the manner provided by this subsection, the Secretary of State shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the entity at its principal office or, if there is no mailing address for the principal office on file, to the entity at its registered office. Service on an entity under this subsection is effective for all purposes from and after the date of the service on the Secretary of State.

N.C. Gen. Stat. § 55D-33(b) (2014).

The evidence in the record shows that the Secretary of State immediately mailed the alias and pluries summons to defendant’s registered address rather than defendant’s principal address as set forth in N.C.G.S. § 55D-33(b). During the hearing, the trial court noted that “the Secretary of State didn’t follow the right procedure and sent [the summons] to

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the wrong address.” However, the trial court also noted that defendant’s registered address was not valid, and that defendant’s failure to provide the Secretary of State with a valid registered address was not excusable neglect. In its order denying defendant’s motion to set aside the default judgment the trial court made the following findings of fact:

1. At all times during this litigation, Defendant maintained a registered mailing address with the North Carolina Secretary of State at 416 Oak Grove Road, Flat Rock, NC 28731. That remained the registered address through the date of this hearing.
2. At all times during the litigation, the registered agent for Defendant was Doug Besaw.
3. Defendant’s registered address was and is unable to receive mail, dating back at least prior to the initiation of this litigation.
4. Plaintiff attempted service on Defendant by mailing a copy of the complaint and summons by certified mail, return receipt requested, to Defendant’s registered agent at the registered address. The envelope was returned to Plaintiff as undelivered.
5. After Plaintiff’s attempted service at Defendant’s registered address failed, Plaintiff mailed an alias and pluries summons and copy of the complaint to the Secretary of State.
6. The Secretary of State received the alias and pluries summons and complaint, and forwarded them to Defendant’s registered address.
7. Defendant’s affidavit indicates that Defendant did not receive a copy of the complaint sent via certified mail from Plaintiff, nor from the Secretary of State.
8. Defendant failed to pay due attention to the possibility that it could be involved in litigation and failed to take steps to ensure that it was notified of claims pending against it.
9. Defendant failed to properly monitor its corporate affairs.

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The trial court then entered the following conclusions of law:

1. Plaintiff attempted service of process on Defendant at its registered mailing address by certified mail, return receipt requested in accordance with North Carolina Rules of Civil Procedure, Rule 4(j)(6). The summons and complaint were returned unserved.
2. Thereafter, and having exercised the due diligence required by statute, Plaintiff effected substitute service on Defendant via the North Carolina Secretary of State pursuant to N.C. Gen. Stat. § 55D-33.
3. As Plaintiff properly achieved service, the judgment against Defendant is not void pursuant to North Carolina Rule of Civil Procedure 60(b)(4).

Defendant cites *Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 351 S.E.2d 779 (1987), in support of his contention that the Secretary of State's failure to mail plaintiff's summons to defendant's principal office, rather than defendant's registered office, resulted in improper service and, therefore, no jurisdiction was obtained by the trial court. However, in *Huggins*, this Court held that service over the defendant was not proper where the Secretary of State did not follow the statutory requirements of N.C. Gen. Stat. § 55-15 because it mailed the plaintiff's alias and pluries summons to an address *other than* the defendant's registered office. *Id.* at 20, 351 S.E.2d at 782 (citing N.C.G.S. § 55-15(b) ("Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.")).

Defendant challenges what he asserts is a broad reading of N.C.G.S. § 55D-33 by the trial court; however, the trial court's determination that

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plaintiff had achieved proper substitute service by serving the Secretary of State's office is based on a common sense reading of the statute.¹ Indeed, N.C.G.S. § 55D-33 makes clear that service on a corporation is, for all intents and purposes, effective "from and after the date of the service on the Secretary of State." N.C.G.S. § 55D-33(b); *Advanced Wall Sys., Inc.*, 167 N.C. App. at 632-33, 605 S.E.2d at 730-31 (citation omitted) (holding that the language of N.C. Gen. Stat. § 57C-2-43(b) (2003) ("Service on [an entity] under this subsection shall be effective for all purposes from and after the date of the service on the Secretary of State.") means that "[w]here the Secretary of State mailed the summons is immaterial because service was effective when Plaintiff served the Secretary of State."). Defendant's argument that the trial court erred in failing to grant defendant's motion to set aside the default judgment due to the Secretary of State mailing the alias and pluries summons to the "wrong" address is, accordingly, overruled.

Defendant raises the additional argument that "[t]he interests of justice demand the default judgment be set aside to avoid unjust enrichment of the Plaintiff." Defendant contends that because plaintiff calculated defendant's insurance premiums by estimating defendant's payroll numbers, plaintiff has been unjustly enriched. However, as defendant does not cite any relevant case law in support of his argument, we decline to address it further.

Defendant also argues that the trial court erred in granting plaintiff's motion to release funds because the judgment upon which plaintiff's writ of execution was based was "void due to defects in service." As it has already been determined that service upon the Secretary of State was sufficient for service of process, we need not address defendant's third issue on appeal. Accordingly, defendant's first and third arguments on appeal are overruled.

1. The language of N.C.G.S. § 55D-33, which directs the Secretary of State's office to forward an alias and pluries summons "to the entity at its principal office or, if there is no mailing address for the principal office on file, to the entity at its registered office[,] " comes from the Business Corporation Act ("the Model Act"). The Model Act sought to resolve the "circularity problem" of having a summons repeatedly sent to an entity's registered address only to be returned as undeliverable by instead instructing the Secretary of State to send the summons to an entity's principal office first in the hope that service would be effectuated. *See* N.C.G.S. §§ 55D-32-33, Official Comments. Despite this language, N.C.G.S. § 55D-30 *et al.* makes clear that a corporation *must* maintain a registered office and agent in North Carolina, and that "[i]f service is not perfected on the corporation at its *registered* office," service may be accomplished through other means. *See id.* §§ 55D-30, 33, Official Comments (emphasis added).

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Personal Jurisdiction

Defendant next argues that the trial court erred in finding personal jurisdiction over defendant. Specifically, defendant contends “[t]he trial court’s flexible interpretation of N.C. Gen. Stat. § 55D-33 . . . violated [his] procedural due process rights.” Defendant concedes that he did not raise a due process argument before the trial court, but argues that his due process argument should be reviewed on appeal because “there was no way for Defendant to preemptively address the trial court’s interpretation of [the statute].” We disagree for, as already discussed, the trial court did not err in its interpretation of N.C.G.S. § 55D-33. Moreover, it is well-established by our Courts that “a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.” *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). Defendant’s argument is, therefore, dismissed.

Admission of Evidence

[3] Finally, defendant argues that the trial court erred in admitting evidence offered by plaintiff. The evidence in question consisted of assertions in plaintiff’s brief filed in opposition to defendant’s motion to set aside the default judgment, and an oral statement by plaintiff’s attorney. However, defendant concedes that the evidence of which he complains is not, “standing alone, . . . so substantial as to have altered the trial court’s ruling had it been excluded.” We agree, as there is nothing in the transcript of the hearing before the trial court to indicate that the trial court did in fact rely on this evidence in making its decision. Rather, after raising his objection to the trial court, defendant admitted that at least part of his objection was based on a “misunderstanding” of plaintiff’s trial brief. Therefore, we decline to address defendant’s argument.

Accordingly, the orders of the trial court are affirmed.

AFFIRMED.

Judges DAVIS and INMAN concur.

DAVIS v. WILLIAMS

[242 N.C. App. 262 (2015)]

SARAH B. DAVIS, NORMAN GOODE, JR., GLORIA H. COLE, MATTIE MILLER,
OSCAR BUCHANAN, AND BEVERLY BUCHANAN, PLAINTIFFS

v.

HENRY WILLIAMS, JR., IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND
NEW ZION BAPTIST CHURCH, DEFENDANTS

No. COA14-1143

Filed 21 July 2015

1. Appeal and Error—interlocutory orders and appeals—ecclesiastical matters immediately appealable

Where the trial court's denial of a Rule 12(b)(1) motion to dismiss could result in the trial court becoming entangled in ecclesiastical matters, such an interlocutory order is immediately appealable.

2. Churches and Religion—church management and use of funds—conversion—embezzlement—obtaining property by false pretenses

The trial court did not err by denying defendants' motion to dismiss plaintiffs' claim regarding defendants' violation of New Zion Baptist Church bylaws. However, the trial court erred by denying defendants' motion to dismiss plaintiffs' claims against the church pastor for conversion and embezzlement/obtaining property by false pretenses. Although our courts may use neutral principles of law to resolve disputes concerning whether a church followed its bylaws, the Constitution requires courts to defer to the church's internal governing body with regard to ecclesiastical decisions concerning church management and use of funds.

Appeal by defendants from order entered 24 June 2014 by Judge Nathaniel J. Poovey in Mecklenburg County District Court. Heard in the Court of Appeals 21 April 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Edward T. Hinson, Jr., and J. Alexander Heroy, for plaintiff-appellees.

Jesse C. Jones, PLLC, by Jesse C. Jones, for defendant-appellants.

BRYANT, Judge.

Our Courts may use neutral principles of law to resolve disputes concerning whether a church followed its bylaws. Our Courts must

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defer to the internal governing body of a church with regard to disputes over the use of church funds.

Plaintiffs Sarah B. Davis, Norman Goode, Jr., Gloria H. Cole, Mattie Miller, Oscar Buchanan, and Beverly Buchanan (hereafter “plaintiffs”) are members of New Zion Baptist Church. Defendant Henry Williams, Jr., was elected pastor of New Zion Baptist Church in 2004.

On 20 December 2013, plaintiffs filed a verified complaint against Williams and New Zion Baptist Church (hereafter “defendants”) alleging that Williams had violated the church’s bylaws regarding voting, refused plaintiffs’ requests to review church accounting records, wrongfully converted church funds for personal use, and embezzled from the church. Plaintiffs sought a declaratory judgment finding that defendants’ voting process to amend New Zion Baptist Church’s bylaws was improper. Plaintiffs also sought an accounting of church records and attorney’s fees. Plaintiffs further brought claims against Williams for conversion and embezzlement/obtaining property by false pretenses.

Defendants filed a Rule 12(b)(1) motion to dismiss plaintiffs’ complaint for lack of subject matter jurisdiction on 24 February 2014. A hearing on defendants’ motion was held on 27 May 2014, the Honorable Nathaniel J. Poovey, Judge presiding. By order entered 24 June 2014, the trial court denied defendants’ motion to dismiss. Defendants appeal.

In their sole issue on appeal, defendants contend the trial court erred in denying defendants’ motion to dismiss. We disagree in part.

[1] We note at the outset that defendants’ appeal is interlocutory in nature. See *In re Will of McFayden*, 179 N.C. App. 595, 599-600, 635 S.E.2d 65, 68 (2006) (“[T]he denial of a motion to dismiss pursuant to Rule 12(b)(1) is interlocutory[.]” (citations omitted)). “[A]ppellate review of an interlocutory order is permissible if . . . the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment.” *John Doe 200 v. Diocese of Raleigh*, __ N.C. App. __, __, __ S.E.2d __, __ (2015) (citing *Keesee v. Hamilton*, __ N.C. App. __, __, 762 S.E.2d 246, 249 (2014)). Where, as here, the trial court’s denial of a Rule 12(b)(1) motion to dismiss could result in the trial court becoming entangled in ecclesiastical matters, such an interlocutory order is immediately appealable. See *Harris v. Matthews*, 361 N.C. 265, 270-71, 643 S.E.2d 566, 569-70 (2007) (holding that where “a civil court action cannot proceed [against a church defendant] without impermissibly entangling the

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court in ecclesiastical matters[.]” such entanglement makes the underlying interlocutory order immediately appealable because such entanglement would affect the church defendant’s First Amendment rights, and “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” (citations and quotation omitted)). Accordingly, we proceed to address the merits of defendants’ appeal.

This Court reviews “Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings.” *Id.* at 271, 643 S.E.2d at 570 (citations omitted).

[2] Defendants argue that the trial court erred in denying their motion to dismiss. Specifically, defendants contend the trial court lacked jurisdiction to review New Zion Baptist Church’s bylaws, management, or use of funds.

The First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters. However, not every dispute involving church property implicates ecclesiastical matters. Thus, while circumscribing a court’s authority to resolve internal church disputes, the First Amendment does not provide religious organizations absolute immunity from civil liability.

Johnson v. Antioch United Holy Church, Inc., 214 N.C. App. 507, 510-11, 714 S.E.2d 806, 810 (2011) (citations and parentheticals omitted). As such, our Courts may resolve disputes through “neutral principles of law, developed for use in all property disputes.” *Id.* at 511, 714 S.E.2d at 810; *see also Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 329, 605 S.E.2d 161, 164 (2004) (citation omitted) (holding that courts can adjudicate property disputes as well as exercise jurisdiction over the narrow issue of whether bylaws of a church were properly adopted). “The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine.” *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998) (citation omitted).

Plaintiffs, in their complaint, allege that defendants violated New Zion Baptist Church bylaws in conducting a vote regarding proposed amendments to the bylaws. This Court has held that such an allegation may be resolved by our courts through neutral principles of law. *See Johnson*, 214 N.C. App. at 511, 714 S.E.2d at 810 (“Whether Defendants’ actions were authorized by the bylaws of the church in no way implicates an impermissible analysis by the court based on religious doctrine

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or practice.”). Indeed, it is well-established that “[w]hen a party brings a proper complaint, [w]here civil, contract[, or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules.” *Harris*, 361 N.C. at 274-75, 643 S.E.2d at 572 (citations and quotation omitted). As plaintiffs’ complaint challenges whether defendants “acted within the scope of [their] authority and observed [New Zion Baptist Church’s] own organic forms and rules[,]” defendants’ motion to dismiss as to plaintiffs’ claim regarding defendants’ violation of New Zion Baptist Church bylaws was properly denied. *Id.*

Plaintiffs also brought claims against Williams for conversion and embezzlement/obtaining property by false pretenses. In their complaint, plaintiffs alleged that “Pastor Williams wrongfully and impermissibly converted to his own use, enjoyment and control substantial funds belonging to Plaintiffs and New Zion [Baptist Church].” Plaintiffs contend that as a result of Williams’ acts of conversion and embezzlement, plaintiffs are entitled to actual, consequential, and punitive damages, as well as attorneys’ fees. However, our Supreme Court has held in *Harris* that such claims are not reviewable under neutral principles of law:

Plaintiffs do not ask the court to determine who constitutes the governing body of Saint Luke or whom that body has authorized to expend church resources. Rather, plaintiffs argue Saint Luke is entitled to recover damages from defendants because they breached their fiduciary duties by improperly using church funds, which constitutes conversion. Determining whether actions, including expenditures, by a church’s pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church’s view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management. Because a church’s religious doctrine and practice affect its understanding of each of these concepts, seeking a court’s review of the matters presented here is no different than asking a court to determine whether a particular church’s grounds for membership are spiritually or doctrinally correct or whether a church’s charitable pursuits accord with the congregation’s beliefs. None of these issues can be addressed using neutral principles of law.

Here, for example, in order to address plaintiffs’ claims, the trial court would be required to interpose its

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judgment as to both the proper role of these church officials and whether each expenditure was proper in light of Saint Luke's religious doctrine and practice, to the exclusion of the judgment of the church's duly constituted leadership. This is precisely the type of ecclesiastical inquiry courts are forbidden to make.

See id. at 273, 643 S.E.2d at 571 (citations omitted). Although plaintiffs' allegations in the instant case that Williams has wrongfully converted and embezzled funds from New Zion Baptist Church are indeed troubling, in light of *Harris*, such claims are not properly reviewable before our Courts; rather, "the Constitution requires courts to defer to the church's internal governing body with regard to ecclesiastical decisions concerning church management and use of funds." *Id.* at 274, 643 S.E.2d at 572. We, therefore, reverse and remand the order of the trial court for entry of dismissal as to plaintiffs' claims against Williams for conversion and embezzlement/obtaining property by false pretenses.

Accordingly, we affirm the ruling of the trial court as to the denial of defendants' motion to dismiss plaintiffs' claim regarding defendants' violation of New Zion Baptist Church bylaws. We reverse and remand the ruling of the trial court as to the denial of defendants' motion to dismiss plaintiffs' claims against Williams for conversion and embezzlement/obtaining property by false pretenses.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges INMAN and DAVIS concur.

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CHRISTOPHER A. FAUCETTE, APRIL FAUCETTE, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MINORS CHRISTOPHER LUKE FAUCETTE AND SARAH EDEN FAUCETTE, AND CHRISTOPHER ASHLEY FAUCETTE, D.D.S., P.A., PLAINTIFFS

v.

6303 CARMEL ROAD, LLC, AND BRADLEY WINER, DEFENDANTS

No. COA14-1248

Filed 21 July 2015

1. Judges—one judge ruling after another—partial summary judgment—interpretation

A trial court judge had jurisdiction to enter final judgment against defendant LLC despite an earlier partial summary judgment by another judge as to all plaintiffs except two individuals. Considering the pleadings, issue, facts, and circumstances, the order was ambiguous and properly subject to interpretation by another superior court judge. In light of this ambiguity and the potential injustice of finding meritorious claims inexplicably dismissed before trial, and with deference to the trial court's interpretation of its own orders, the conclusion that the summary judgment order did not dismiss the claims against the LLC was affirmed.

2. Settlement and Compromise—settlement letter

Any error in the exclusion of a settlement letter in a conversion action was harmless in a bench trial where the trial court was aware that defendants made numerous conditional offers to settle but did not make those offers until the litigation had continued for years. The trial court's actual finding was that defendants did not unconditionally offer to pay the disputed amount, and the letter did not refute that finding.

3. Unfair Trade Practices—conversion of money—sufficient for claim

The trial court did not abuse its discretion in a conversion action by concluding that defendants had committed an unfair or deceptive trade practice where the findings were supported by defendants' failure to unconditionally return the money. The mere act of tortious conversion can satisfy the elements of a Chapter 75 claim. Here, defendants abused their positions of power to withhold payment of the money plaintiff was owed, solely to pressure to plaintiff to resolve unrelated disputes, and their actions were in or effecting commerce.

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4. Pleadings—motion to amend—denied

The trial court did not abuse its discretion by denying defendants' motion to amend their pleading to conform to the evidence by adding counterclaims. Defendants did not seek to add the claims earlier in the proceedings, and plaintiff did not expressly or impliedly consent to try these claims as part of the case.

5. Unfair Trade Practices—attorney fees awarded—no abuse of discretion

The trial court did not abuse its discretion in an unfair trade practices claim arising from a conversion where the trial court awarded attorney fees to plaintiff's counsel. The trial court did not err by concluding that defendants' conduct was willful or in the amount of fees awarded.

6. Attorneys—fees—unfair and deceptive trade practices

Plaintiffs who were entitled to attorney fees for the hours expended at the trial level in an unfair and deceptive trade practices claim were entitled to attorney fees on appeal.

Appeal by Defendants from final judgment entered 9 May 2014 by Judge Eric Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 April 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for Plaintiff-Appellee.

McNair Law Firm, P.A., by Samuel I. Moss and Jeremy A. Stephenson, for Defendants-Appellants.

DIETZ, Judge.

This appeal is the culmination of a long-running dispute over \$5,000. Plaintiff Christopher A. Faucette is a dentist who owns a commercial condominium. Defendant 6303 Carmel Road, LLC owns several adjacent condominium units. Defendant Bradley Winer is the member-manager of the Defendant LLC and also the president of the 6303 Carmel Road Condominium Association.

In December of 2010, a pipe burst above one of Defendants' units that shares a common interior wall with Faucette's unit. The resulting flood caused extensive damage to both units. Faucette recovered from his own insurance policy, but had to pay a \$5,000 deductible. Defendants

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made a claim on the condominium association's insurance policy and received a large settlement that included \$5,000 to reimburse Faucette for his deductible.

Instead of releasing those funds to Faucette, Defendants kept the money for leverage in an ongoing dispute with Faucette over payment of condominium association dues. What followed was a series of demand letters, threats of lawsuits, and ultimately a bench trial for conversion and unfair and deceptive trade practices. The trial court entered judgment in favor of Faucette for \$5,000, trebled the award to \$15,000, and awarded \$27,000 in attorneys' fees.

On appeal, Defendants argue that one superior court judge improperly overruled another in the interpretation of a summary judgment order, that the trial court improperly excluded evidence at the bench trial, and that Faucette failed to prove his unfair and deceptive trade practices claim or show his entitlement to attorneys' fees.

For the reasons discussed below, we reject Defendants' arguments. The trial court's interpretation of the summary judgment order was permissible, any error in the exclusion of the challenged evidence was harmless, and the trial court's findings and conclusions on the Chapter 75 claim and corresponding attorneys' fees award are supported by competent evidence. Accordingly, we affirm the judgment of the trial court.

Facts and Procedural Background

Plaintiff Christopher A. Faucette owns Unit 102 in a commercial condominium building located at 6303 Carmel Road in Charlotte, North Carolina, where he has operated a dental practice for nearly twenty years. Defendant 6303 Carmel Road, LLC, owns four condominium units in the same building, including Unit 103, which is adjacent to and shares an interior wall with Faucette's unit. Defendant Bradley Winer is a member-manager of Defendant LLC.

Defendant Winer is also the president of 6303 Carmel Road Condominium Association, Inc., the entity that manages the condominium complex. The North Carolina Secretary of State administratively dissolved the condominium association on 30 October 2006 for failure to pay taxes, and it remained dissolved at the time of trial. Defendant Winer is the sole signatory on the condominium association's bank account, and the statements for that account are mailed to Winer's personal residence. The condominium association was never a party to this litigation.

On 15 December 2010, a pipe burst above Defendants' Unit 103, causing a flood that damaged both Unit 103 and Faucette's Unit 102. Faucette

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maintains an insurance policy on his unit through State Farm, and he submitted a claim on this policy for extensive damage resulting from the flood. State Farm reimbursed Faucette for the cost of repairs, issuing a check for the amount owed reduced by Faucette's \$5,000 deductible.

After the flood, Defendants similarly submitted a claim to the condominium association's insurance company, which issued a \$21,000 settlement check to Defendants in late January 2011. The check included \$5,000 to reimburse Faucette for his deductible. Defendants refused to turn this money over to Faucette, however, despite Faucette's written demand that Defendants do so. Instead, citing an ongoing dispute with Faucette over payment of condominium association dues, Defendants held the funds, placed them in the condominium association's bank account, and later gave them to Defendants' attorney to deposit in the law firm's trust account.

On 31 January 2011, Faucette, through counsel, wrote Defendant Winer a letter demanding payment of \$10,626. State Farm also sent Winer a letter notifying Defendants of its subrogation rights and demanding payment of the \$5,000 owed to its insured. Defendant Winer issued a written response to these letters, through his attorney, on 15 March 2011, offering to settle the dispute. In the settlement offer, Winer proposed to direct the condominium association to pay Faucette \$5,165 in exchange for a release of all potential claims against Defendant Winer and the condominium association. Faucette did not accept the terms of this offer.

Defendant Winer testified at deposition that Defendants refused to return Faucette's \$5,000 deductible in part because of an ongoing disagreement with Faucette over unpaid condominium association dues. Defendant Winer testified that he understood the money belonged to Faucette but refused to return it:

Q. All right. And you did that intentionally because you were basically pissed off at Dr. Faucette?

A. Yes.

Q. But you understand that's his money?

A. Uh-huh. Yes.

Q. And he has asked for it back?

A. Yes.

Q. And you haven't given it to him?

A. No. That means no. Sorry.

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Faucette and his wife filed a complaint against Defendants on 16 December 2011, and the parties attended a mediated settlement conference as required by court order. Mediation failed, and Plaintiffs later voluntarily dismissed the action, without prejudice, on 25 September 2012. Faucette, his wife, their minor children, and Faucette's dental practice subsequently commenced this lawsuit against Defendants on 7 December 2012, asserting claims for negligence, trespass, conversion, unfair and deceptive trade practices, piercing the corporate veil/alter ego, and punitive damages. All of the claims stemmed from the flood and Defendants' refusal to pay the \$5,000 for Faucette's deductible.

In response to the September 2012 lawsuit, Defendants immediately contacted Faucette's attorney regarding a possible settlement, but no negotiations followed. On 15 January 2013, Defendants moved to dismiss the negligence and trespass claims asserted by all of the plaintiffs other than Faucette. Defendants also moved to dismiss the unfair and deceptive trade practices claim in its entirety. The trial court decided Defendants' motion by order entered 3 March 2013, accepting a stipulation that only Faucette and the dental practice were asserting the trespass claim and denying the remainder of Defendants' motion.

Defendants moved for partial summary judgment on 12 March 2013. The summary judgment motion asserted that Defendants were entitled to judgment on Plaintiffs' claims for unfair and deceptive trade practices, mold-related bodily injury, negligence, trespass, and punitive damages. The motion did not challenge, or even mention, Faucette's conversion claim.

Before the trial court ruled on Defendants' summary judgment motion, the parties again attempted mediation on 28 June 2013 but were unsuccessful. However, on 19 August 2013, Defendants directed their attorney to disburse \$5,000 from the law firm's client trust account made payable to Faucette.

On 18 September 2013, Judge Richard Boner entered an order on Defendants' motion for partial summary judgment, stating in relevant part:

Defendants' Motion for Summary Judgment is GRANTED in its entirety as to all of Plaintiffs' Claims, which claims are hereby dismissed with prejudice, EXCEPT for the claims of Christopher A. Faucette against Bradley Winer for "conversion" and "unfair and deceptive trade practices" and any damages therefrom, which are not dismissed and as to such claims the Motion is DENIED.

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The case came on for a bench trial before Judge Eric Levinson on 27 September 2013. At the trial, Defendants offered into evidence the settlement letter, dated 15 March 2011, to challenge Faucette's assertion that Defendants unreasonably refused to fully resolve the matter. Faucette's counsel objected to admission of the settlement letter into evidence, and Judge Levinson sustained the objection under Rule 408 of the North Carolina Rules of Evidence.

The trial resumed for a second day on 18 October 2013. Defendants moved the court for leave to amend their answer to add counterclaims for unjust enrichment and violation of Chapter 75 based on Faucette's admissions at trial that he had refused to pay condominium association dues. The court orally denied this motion.

At the urging of the trial court, Defendants again attempted to settle the matter with Faucette on 20 October 2013. No negotiations followed, however, and the trial court concluded that Defendants had illegally converted Faucette's \$5,000. The court further determined that Faucette's conversion claim fell within Chapter 75 and thus trebled Faucette's damages of \$5,000 to \$15,000, reduced by the \$5,000 already paid by Defendants.

On 7 November 2013, at the invitation of the trial court, Faucette filed a motion for attorneys' fees, requesting \$49,538.16. Counsel for Defendants filed an affidavit in opposition to this motion, arguing that Defendants had made several "good faith efforts" to resolve the claims over the course of the litigation. Faucette did not dispute the parties' history of settlement discussions, offers, demands, or mediations. Nevertheless, on 9 May 2014, the trial court entered a final judgment concluding that Defendants converted Faucette's funds, the conversion violated Chapter 75's prohibition against unfair and deceptive trade practices, and Defendants unwarrantedly refused to fully resolve the matters raised in the lawsuit. In light of these conclusions, the court awarded \$27,000 in attorneys' fees to Faucette's counsel pursuant to N.C. Gen. Stat. § 75-16.1 (2013).

Defendants timely appealed.

Analysis**I. Jurisdiction to Enter Final Judgment Against Defendant LLC**

[1] Defendants first argue that the trial court lacked jurisdiction to enter final judgment against Defendant LLC because, at summary judgment, the court granted partial summary judgment as to "all of Plaintiffs' claims . . . EXCEPT for the claims of Christopher A. Faucette

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against Bradley Winer for ‘conversion’ and ‘unfair and deceptive trade practices.’” Defendants contend that, by the plain terms of the summary judgment order, all claims against Defendant LLC were dismissed. For the reasons set forth below, we disagree.

“Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole. The interpreting court must take into account the pleadings, issues, the facts of the case, and other relevant circumstances.” *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986) (citations omitted). If a judgment is susceptible to multiple interpretations when considered in light of all relevant circumstances, the court should adopt the interpretation that is in line with the law applicable to the case. *See, e.g., Blevins v. Welch*, 137 N.C. App. 98, 102, 527 S.E.2d 667, 670 (2000). “Generally, the interpretation of judgments presents a question of law that is fully reviewable on appeal.” *Id.* at 101, 527 S.E.2d at 670. However, this Court will afford some degree of deference to the trial court’s interpretation of an ambiguous judgment. *See id.* at 102, 527 S.E.2d at 671.

We hold that in entering final judgment against Defendants, the trial court properly interpreted the order as denying summary judgment on the conversion and Chapter 75 claims against *both* Defendant Winer and Defendant LLC. First, Defendant Winer and Defendant LLC presented the *identical* argument in support of summary judgment on the Chapter 75 claim—maintaining that their conduct did not affect commerce and was neither unfair nor deceptive. Defendants did not assert that there were grounds for dismissing the claim against the LLC but not against Winer, and no party discussed that possibility at the hearing. Thus, there was no basis for the trial court to dismiss the Chapter 75 claim against one but not both Defendants.

More importantly, Defendants did not even request summary judgment on Faucette’s conversion claim. But the summary judgment order, as written, purports to dismiss that claim with respect to Defendant LLC. That the order appears to dismiss a claim that Defendants did not even ask to be dismissed is strong evidence that the order is ambiguous.

In sum, upon reviewing “the pleadings, issues, the facts of the case, and other relevant circumstances” surrounding the order, we conclude that the order is ambiguous and thus properly subject to interpretation by another superior court judge later in the proceeding. In light of this ambiguity and the potential injustice of finding meritorious claims inexplicably dismissed before trial, and according due deference to the trial court in the interpretation of its own orders, we affirm the trial

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court's conclusion that its summary judgment order did not dismiss the conversion and Chapter 75 claims against Defendant LLC.¹

II. Exclusion of Settlement Letter

[2] Defendants next argue that the trial court erred in sustaining Faucette's objection to admission of the March 2011 settlement letter into evidence. At the bench trial, Defendants sought to introduce the letter (which their counsel sent to Faucette's counsel) offering to pay \$5,165 in exchange for Faucette signing a settlement agreement releasing Defendants from any future claims. Defendants argued at trial that the settlement letter was admissible under Rule 408 because Faucette claimed Defendants unreasonably refused to pay him the \$5,000 from the condominium association's insurance, and "this document squarely shows that as of March, 2011 we're not refusing to make a payment."

We need not determine whether the trial court correctly applied Rule 408 because any error in the admission of this settlement letter was harmless as a matter of law.

"Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right." *Walker v. Walker*, 201 N.C. 183, 184, 159 S.E. 363, 364 (1931). The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different. *Medford v. Davis*, 62 N.C. App. 308, 311, 302 S.E.2d 838, 840 (1983); *see also Burgess v. C.G. Tate Const. Co.*, 264 N.C. 82, 83, 140 S.E.2d 766, 767 (1965) ("The burden is on appellant to show not only that there was error in the trial but also that there is a reasonable probability that 'the result was materially affected thereby to his hurt.'").

Defendants maintain that the trial court's exclusion of the settlement letter was not harmless because "the letter completely contradicted Faucette's contentions that [Defendants] failed to offer to return the funds and that there were unwarranted refusals by [Defendants] to fully resolve the matter." But this ignores the trial court's actual finding—that Defendants did not *unconditionally* offer to pay the disputed \$5,000. The settlement letter, which offered to return the \$5,000 only if Faucette

1. Faucette has filed a motion with this Court seeking leave to request the trial court correct the order pursuant to N.C. Gen. Stat. §1A-1, Rule 60(a) (2013). In light of our holding, we deny this motion as moot.

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agreed to certain things in return, does not refute the trial court's findings that Defendants refused to unconditionally return the money until years after this dispute began.

Moreover, "[e]rror in the exclusion of evidence is harmless when other evidence of the same import is admitted." *Medford*, 62 N.C. App. at 311, 302 S.E.2d at 840. Here, Defendants submitted—and the trial court considered—numerous examples of Defendants' offers to settle. Faucette did not dispute the facts regarding the parties' history of settlement discussions, offers, demands, or mediations. Defendants even admit in their brief to this Court that "[e]ven assuming, *arguendo*, the [settlement] letter was properly excluded, the record is full of undisputed evidence of ongoing efforts of Winer to fully resolve Faucette's conversion claim."

Simply put, the trial court was aware that Defendants made numerous offers to settle in which they conditioned payment of the \$5,000 on concessions, releases, or other commitments from Faucette. But there was no evidence that Defendants made an *unconditional* offer to return the \$5,000 until this costly litigation had gone on for years. It was this failure to promptly offer the unconditional return of the money that supported the trial court's findings. Accordingly, any error in excluding the settlement letter was harmless. *See Shepard v. Drucker & Falk*, 63 N.C. App. 667, 672, 306 S.E.2d 199, 203 (1983).

III. Unfair and Deceptive Trade Practices

[3] Defendants next argue that the trial court erred by concluding that Defendants committed unfair or deceptive trade practices in violation of Chapter 75 of our General Statutes. We review the trial court's findings of fact for competent evidence and the court's conclusions of law *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

"To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991); *see also* N.C. Gen. Stat. § 75-1.1 (2013). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); *see also D.G. II, LLC v. Nix*, 213 N.C. App. 220, 230, 713 S.E.2d 140, 148 (2011) ("[A]n act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." (internal

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quotation marks omitted)). The statute does not apply to every transaction that might be viewed as unfair or deceptive, but applies only if the alleged violator is engaged in “commerce.” See N.C. Gen. Stat. § 75-1.1. Our legislature has defined “commerce” very broadly, however, to include “all business activities, however denominated,” with the exception of “professional services rendered by a member of a learned profession.” *Id.* § 75-1.1(b); see also *Prince v. Wright*, 141 N.C. App. 262, 268, 541 S.E.2d 191, 197 (2000) (“Commerce in its broadest sense comprehends intercourse for the purpose of trade in any form.”).

Defendants argue that their improper conversion of the \$5,000 was not “unfair and deceptive” and not “in or affecting commerce” within the meaning of the statute because it was simply a “private and personal dispute between Faucette and Winer, or intra-corporate dispute among and between members of the Condominium Association.”

This Court previously has held that a defendant’s mere act of tortious conversion can satisfy the elements of a Chapter 75 claim. See, e.g., *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 83, 665 S.E.2d 478, 487 (2008); *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 374-75, 614 S.E.2d 555, 560-61 (2005); *Lake Mary Ltd. P’ship v. Johnston*, 145 N.C. App. 525, 533-34, 551 S.E.2d 546, 552-53 (2001). Here, Defendants converted funds belonging to Faucette by refusing to turn over the \$5,000 that Defendants owed Faucette from the insurance settlement. Defendants obtained those funds because of Defendant Winer’s position as acting president and sole custodian of the condominium association’s finances and Defendant LLC’s ownership of the adjacent units damaged by the burst pipe. Defendants abused their positions of power to withhold payment of the money Faucette legally was owed, solely to pressure Faucette to resolve several unrelated disputes between the parties, including an ongoing dispute involving payment of condominium association dues. This wrongful conduct is unfair or deceptive within the meaning of the statute. See *Lake Mary Ltd.*, 145 N.C. App. at 533-34, 551 S.E.2d at 552-53 (concluding that defendant’s conversion constituted an unfair or deceptive act or practice when it was accomplished through “an inequitable assertion of [defendant’s] power and position”); *Gray v. N.C. Ins. Underwriting Ass’n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2002) (noting that “where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice”).

Defendants’ acts also were in or affecting commerce. Defendant Winer testified that he knew that \$5,000 from the condominium association’s insurance settlement belonged to Faucette and that

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Faucette had demanded return of the money. Faucette's insurer also notified Defendants of its subrogation rights, demanding that Defendants release the funds belonging to Faucette. Defendants nevertheless refused to surrender these funds unless Faucette agreed to certain conditions unrelated to that insurance payment, including the payment of outstanding condominium association dues. Withholding money owed from an insurance carrier's settlement payment in order to force the rightful recipient of those funds to resolve other, unrelated business disputes is conduct "in or affecting commerce" under Chapter 75. *See Adams v. Jones*, 114 N.C. App. 256, 259, 441 S.E.2d 699, 700 (1994). Accordingly, we affirm the trial court's final judgment holding Defendants liable for unfair and deceptive trade practices.

IV. Motion for Leave to Amend

[4] In the middle of trial, Defendants filed a motion to amend their responsive pleading to "conform to the evidence" by adding counterclaims for unjust enrichment, violation of Chapter 75, and punitive damages arising out of Faucette's refusal to pay dues to the condominium association. The trial court orally denied this motion. We hold that the trial court's denial was well within its sound discretion.

Rule 15(b) of the North Carolina Rules of Civil Procedure states that "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. R. Civ. P. 15(b) (2013). We review the denial of a Rule 15(b) motion for abuse of discretion. *Marina Food Assocs., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 89, 394 S.E.2d 824, 828 (1990).

In denying Defendants' motion, the trial court noted that Defendants sought to add "fairly substantial claims: Unjust enrichment, Chapter 75, et cetera" for the first time in the middle of trial. The court also stated that any evidence relating to those claims was not "tried by the express or implied agreement of the parties. In fact, there's been vociferous . . . there's been, you know, strong argument against" admission of that evidence. Finally, the court stated that "I don't agree that it advances the interest of justice to [grant leave to amend]."

Given Defendants' failure to seek leave to add these claims earlier in the proceedings, and the trial court's finding—a correct one, in our review of the record—that Faucette did not expressly or impliedly consent to try these claims as part of the case, we hold that the trial court's denial of leave to amend was within its sound discretion to manage the course of the trial proceedings.

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V. Award of Attorneys' Fees**a. Trial Court's Award**

[5] Defendants next argue that the trial court abused its discretion in awarding attorneys' fees to Faucette's counsel. Defendants claim that the trial court's findings of fact and supporting record evidence do not support the court's conclusions of law that Defendants refused to fully resolve the dispute, that Defendants acted willfully, or that Faucette met his burden to recover attorneys' fees under N.C. Gen. Stat. § 75-16.1 (2013). We disagree.

A trial court may award reasonable attorneys' fees to a prevailing party under Chapter 75 upon finding, in relevant part, that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." *Id.* § 75-16.1(1). "The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial judge. And if fees are awarded, the amount also rests within the discretion of the trial court." *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006), *aff'd*, 361 N.C. 347, 643 S.E.2d 586 (2007) (internal quotation marks omitted).

This Court employs a two-pronged standard of review in considering a trial court's award of fees pursuant to N.C. Gen. Stat. § 75-16.1(1). *See, e.g., Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 150 N.C. App. 231, 248-49, 563 S.E.2d 269, 280-81 (2002). First, we determine whether any competent evidence supports the trial court's findings of fact and whether these findings support the court's conclusions of law. *See id.* Second, we review the trial court's fee award for abuse of discretion. *See id.* at 249, 563 S.E.2d at 281. A trial court abuses its discretion only when its award of fees is "manifestly unsupported by reason or wholly arbitrary." *Id.*

We hold that the trial court did not err in concluding that Defendants' refusal to return the \$5,000 was unwarranted. Defendants again attempt to focus this Court's attention on the March 2011 settlement letter and other settlement negotiations, arguing that "the record is full of undisputed evidence of ongoing efforts of Winer to fully resolve Faucette's conversion claim." But as the trial court properly found, all of those purported efforts to resolve the claim imposed conditions—that is, they demanded that Faucette also make some concessions or agree to release or waive potential liability. The record discloses no effort by Defendants to *unconditionally* pay the \$5,000 until years after this

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litigation began. Thus, the trial court's findings support its conclusion that Defendants' refusal to resolve this dispute was unwarranted.

The trial court likewise did not err in concluding that Defendants' conduct was willful. An act is "willful" within the meaning of N.C. Gen. Stat. § 75-16.1(1) if it is "done voluntarily and intentionally with the view to doing injury to another." *Standing v. Midgett*, 850 F. Supp. 396, 404 (E.D.N.C. 1993). Here, the trial court made numerous unchallenged findings regarding Defendants' willful conduct, and Defendant Winer admitted in his sworn deposition testimony that he intentionally withheld the \$5,000 despite knowing that these funds belonged to Faucette. Accordingly, the trial court's conclusion of willfulness is supported by its findings.

Finally, we hold that the trial court did not abuse its discretion in selecting the amount of attorneys' fees to award Faucette's counsel. The trial court made detailed findings regarding "the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney." *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 626, 664 S.E.2d 388, 396 (2008). Accordingly, we affirm the trial court's award of attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1(1).

b. Fees on Appeal

[6] Faucette also requests an award of attorneys' fees incurred during this appeal. In previous Chapter 75 cases, we have held that "[u]pon a finding that [appellees] were entitled to attorney's fees in obtaining their judgment [under N.C. Gen. Stat. § 75-16.1], any effort by [appellees] to protect that judgment should likewise entitle them to attorney's fees." *Willen v. Hewson*, 174 N.C. App. 714, 722, 622 S.E.2d 187, 193 (2005) (internal quotation marks omitted). "[B]ecause plaintiffs were entitled to attorneys' fees for hours expended at the trial level, plaintiffs are entitled to attorneys' fees on appeal." *Id.* at 723, 622 S.E.2d at 193. Accordingly, we remand to the trial court for a determination of the hours spent on appeal and a reasonable hourly rate, and for the entry of an appropriate attorneys' fee award.

Conclusion

We affirm the trial court's judgment.

AFFIRMED AND REMANDED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

**GOOD NEIGHBORS OF OR. HILL PROTECTING PROP. RIGHTS v. CNTY.
OF ROCKINGHAM**

[242 N.C. App. 280 (2015)]

GOOD NEIGHBORS OF OREGON HILL PROTECTING PROPERTY RIGHTS AND
ASHLEY M. WYATT, PLAINTIFFS

v.

COUNTY OF ROCKINGHAM, DEFENDANT

No. COA15-121

Filed 21 July 2015

1. Zoning—spot zoning—“single person” ownership requirement

On appeal from the denial of Rockingham County’s summary judgment motion in an action concerning a rezoning ordinance, the Court of Appeals held that the rezoning was not spot zoning because the tract of land in question was owned by a father and son rather than a “single person.” The Court of Appeals further concluded that the trial court improperly weighed the evidence and substituted its judgment for that of the Board of Commissioners. The case was reversed and remanded for a new summary judgment hearing.

2. Zoning—notice to abutting property owners—certification—conclusive in absence of fraud

On a summary judgment motion in an action concerning a rezoning ordinance, the trial court erred by concluding there was no genuine issue of material fact that certain abutting property owners did not receive notice of the Board of Commissioner’s hearing as required by statute. Pursuant to the statute, the certification that notices were sent is deemed conclusive in the absence of fraud.

3. Zoning—summary judgment motion—improper weighing of evidence

On a summary judgment motion in an action concerning a rezoning ordinance, the trial court erred by concluding that there was no genuine issue of material fact that the rezoning applicant had violated the zoning ordinance by pouring a concrete pad on the tract of land before submitting his rezoning application. The trial court improperly weighed the evidence to reach this conclusion.

Appeal by defendant from order entered 14 November 2014 by Judge Patrice A. Hinnant in Rockingham County Superior Court. Heard in the Court of Appeals 3 June 2015.

Wayne E. Crumwell for plaintiffs.

G. Nicholas Herman and Robert V. Shaver, Jr. for defendant.

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ELMORE, Judge.

The County of Rockingham (defendant) appeals the denial of its summary judgment motion and the entry of summary judgment in favor of Good Neighbors of Oregon Hill Protecting Property Rights and Ashley M. Wyatt (plaintiffs). After careful consideration, we reverse and remand for further proceedings.

I. Background

The facts relevant to this appeal are as follows: On 10 August 2012, Philip M. Behe (aka “Matt Behe”) and his father, Philip L. Behe¹, purchased through North Carolina Special Warranty Deed the property located at 403 Live Oak Road in Reidsville. The property consisted of a 101.76 acre tract, and Matt Behe wished to subdivide approximately two acres out of the parent tract for a kennel to be used as a bird-dog training facility. Matt Behe owns Rocky River Gun Dogs, LLC, which has trained world and national championship bird dogs. On 5 September 2012, Matt Behe and his wife, Megan Behe, filed an application with Rockingham County to rezone the two-acre tract from Residential Agricultural to Highway Commercial – Conditional District.

The Rockingham County Planning Staff issued a report, Case #2012-016, recommending a request for rezoning from Residential Agricultural to Highway Commercial – Conditional District, with the following nine conditions:

1. All development shall proceed in accordance with the site plan, including applicant submitted materials, and any changes may require a Site Plan Amendment.
2. The applicant is responsible for obtaining and complying with all required permits and approvals.
3. The Applicant shall use Best Management Practices for any additional grading and erosion control as shown in either the (*USDA-Natural Resources Conservation Service Field Office Technical Guide*) or the (*NC Erosion and Sediment Control Planning and Design Manual*).
4. A Type I landscape buffer, either planted or existing, must be maintained in a healthy manner along all property

1. In the record, Philip is interchangeably spelled both Philip and Phillip, including in the deed to the property at issue. We spell it “Philip” in this opinion.

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lines adjoining residentially zoned properties. A chain link fence with slats providing 90% coverage is acceptable as a type I visual buffer. The landscaping or buffer must be installed within one year of the date of the Certificate of Occupancy for the building.

5. Lighting fixtures shall be full cut-off or shoebox type fixtures and shall be aimed and shielded in a manner that would not direct illumination on adjacent properties.

6. The required Parking shall be calculated at one (1) space per 400 sq. ft. of gross floor area.

7. Prior to operation of the business, the applicant shall contact the North Carolina Department of Transportation to determine if a commercial driveway permit is needed. The applicant shall provide the Planning Department with a copy of the commercial driveway permit or a letter from the North Carolina Department of Transportation stating a permit is not needed.

8. Applicant must dispose of all wastes in accordance with the applicable federal, state, and local regulations.

9. Within 60 days of approval of the rezoning request, a minimum 30,000 square feet lot shall be subdivided from the parent tracts according to the site plan provided by the applicant.

On 8 July 2013, the Rockingham County Planning Board (Planning Board) voted 6-4 in favor to rezone approximately 1.9 acres of the 101.76 tract from Residential Agricultural to Highway Commercial – Conditional District for a kennel dog training facility. On 5 August 2013, the Rockingham County Board of Commissioners (BOC) approved the zoning amendment, with a 4-1 vote. In the BOC's rezoning order, it included the nine conditions listed above that were recommended by the Planning Staff.

On 24 October 2013, plaintiffs sought a preliminary injunction and a declaratory judgment in superior court that the rezoning ordinance adopted by the BOC was void and of no legal effect. Plaintiffs alleged four claims: (1) the rezoning constituted illegal spot zoning; (2) defendant failed to comply with statutory requirements; (3) defendant failed to comply with requirements of the zoning ordinance; and (4) defendant's decision to rezone the property was arbitrary and capricious and is therefore void and of no effect.

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On 26 November 2013, defendant denied each allegation outlined in plaintiffs' four claims. The parties filed cross-motions for summary judgment. While the case was pending, Matt Behe, Megan Behe, Philip L. Behe, and his wife, Cheryl Behe, transferred ownership of the 403 Live Oak Road property to Rocky River Gun Dogs, LLC through a North Carolina General Warranty Deed in April 2014.

On 14 November 2014, the trial court granted plaintiffs' motion for summary judgment. In its order, the trial court listed thirteen points to justify its holding, none of which were identified as findings of fact or conclusions of law. The final point in the order stated:

13. The re-zoning decision was not shown to be in compliance with the local zoning ordinance and the state enabling statutes in the following respects:

a) Among the Commercial Rezoning Site Plan Requirements is III, which requires the Applicant to make a good faith effort to meet with the owners of neighboring properties to discuss the application by requiring him to arrange a date for the meeting and mailing written notice to all properties within 250 feet of the property proposed to be rezoned. The record does not reveal where the Applicant complied with this requirement.

b) The Report, pages 8 and 9, summarizes the testimony of several so described owners of parcels of land abutting that parcel of land for which re-zoning was being sought did not receive notification as provided by Chapter 153A-343.

c) The record reveals that the Applicant began excavation and installation of the structure intended for use under the rezoning before securing the zoning permit from the defendant as specifically prohibited under the Zoning Ordinance at Section 15-2 (a).

Defendant timely appealed to this Court on 25 November 2014.

II. Analysis**a.) Illegal Spot Zoning**

[1] We must determine whether the trial court erred in granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment. As a threshold matter, defendant argues

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for the first time on appeal that, as a matter of law, the rezoning of the two-acre tract does not involve spot zoning. We agree.

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). This is a proper case for summary judgment as “there is no substantial controversy as to the facts disclosed by the evidence. The controversy is as to the legal significance of those facts.” *Blades v. City of Raleigh*, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972).

Our Supreme Court has defined spot zoning as:

A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract *owned by a single person* and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected[.]

Id. at 549, 187 S.E.2d at 45 (emphasis added). In North Carolina, “‘spot zoning’ is a descriptive term merely, rather than a legal term of art, and [] spot zoning practices may be valid or invalid depending upon the facts of the specific case.” *Chrismon v. Guilford Cnty.*, 322 N.C. 611, 626, 370 S.E.2d 579, 588 (1988). As such, “the practice is not invalid per se but, rather, [] it is beyond the authority of the municipality or county and therefore void *only* in the absence of a clear showing of a reasonable basis therefor.” *Id.* at 627, 370 S.E.2d at 589 (internal quotation and citation omitted) (emphasis in original).

In every alleged spot zoning case, our courts apply a two-part test in order to determine if the spot zoning is lawful. Specifically, the trial court must consider “(1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning.” *Id.* In analyzing the second prong of the test, a number of factors are considered, including:

[T]he size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property,

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his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Id. at 628, 370 S.E.2d at 589.

This Court has previously stated: “An essential element of spot zoning is a small tract of land owned by a single person and surrounded by a much larger area uniformly zoned.” *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 895 (2009). When applying the above test in a spot zoning case, the burden is on the zoning authority to show that the spot zoning is lawful, *see Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589, whereas in an ordinary zoning case, “[t]he burden is on the complaining party to show [the zoning change] to be invalid” and “[a] duly adopted zoning ordinance is presumed to be valid.” *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981). Accordingly, the question of whether a zoning change constitutes spot zoning is relevant because the burden of proof shifts depending on the determination.

In the parties’ cross-motions for summary judgment, each party stipulated that this was a spot zoning case. The trial court found: “The parties spoke without objection as to whether the zoning was spot zoning.” However, defendant now argues that the rezoning of the two-acre tract does not involve spot zoning because the parcel was owned by Matt and Philip Behe, as father and son, when the application for the rezoning was filed. Defendant’s argument has merit.

In *Musi*, the plaintiffs tried to bring a spot zoning claim to challenge the rezoning of 15 separate parcels owned by six different owners from the same extended family despite the “common owner” requirement for spot zoning. *Musi*, 200 N.C. App. 379, 383, 684 S.E.2d at 895. The plaintiffs cited three cases in support of their proposition, none of which this Court found to be persuasive. “Two of these, *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885 (1988); and *Lathan v. Bd. of Commissioners*, 47 N.C. App. 357, 267 S.E.2d 30 (1980), involved the rezoning of property with a common owner, and thus shed no light on this issue.” *Id.* at 383, 684 S.E.2d at 895.

Specifically, *Alderman* involved a parcel owned by a husband and wife, which this Court concluded met the common owner requirement for spot zoning. *Alderman*, 89 N.C. App. at 617, 366 S.E.2d at 889-90. The second case, *Lathan*, concerned a parcel owned by the “Keith Nesbitt family,” which this Court impliedly determined, without discussion,

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also met the common owner requirement for spot zoning. *Lanthan*, 47 N.C. App. at 357, 267 S.E.2d at 30. The third case, *Budd v. Davie Cnty.*, involved the rezoning of a tract of land owned by a mother and a strip of land running from the tract owned by her son. *Budd*, 116 N.C. App. 168, 170, 447 S.E.2d 449, 450-51 (1994). Despite the fact that the tract of land and the strip of land were separately owned by a mother and her son, the *Budd* Court held that the rezoning met the common owner requirement for spot zoning. *Id.* at 174, 447 S.E.2d at 452. Accordingly, the plaintiffs in *Musi* argued that *Budd* was analogous to their case and was controlling.

However, the *Musi* Court was not persuaded, and it declined to extend *Budd* to permit a spot zoning claim, reasoning:

Firstly, *Budd's* holding is internally inconsistent. After quoting the same definition of spot zoning given [in *Blades*, 280 N.C. at 549, 187 S.E.2d at 45], and even noting that an “essential element of spot zoning is a small tract of land owned by a single person”, the Court then holds that the rezoning in question, involving property with two different owners, was spot zoning.

Musi, 200 N.C. App. at 383, 684 S.E.2d at 895-96. Additionally, the *Musi* Court noted that in *Good Neighbors of South Davidson v. Town of Denton*, 355 N.C. 254, 259, 559 S.E.2d 768, 772 (2002), a Supreme Court of North Carolina case decided after *Budd*, our Supreme Court reiterated the requirement that spot zoning must involve a parcel with one owner. *Musi*, 200 N.C. App. at 383, 684 S.E.2d at 896. Therefore, “[t]o the extent that *Good Neighbors* conflicts with *Budd*, we are bound to follow *Good Neighbors*.” *Id.* Accordingly, the *Musi* Court upheld the trial court’s grant of summary judgment in favor of the defendant on the basis that the plaintiffs failed to satisfy the “single ownership” requirement for spot zoning.

Recently, in *Wally v. City of Kannapolis*, the plaintiffs, while admitting that the rezoned property was owned by two entities, nevertheless argued that the rezoning of the subject parcels was spot zoning. *Wally*, No. 13-1425, 2014 WL 7472941, at *2-3, (N.C. Ct. App. Dec. 31, 2014). The plaintiffs challenged the *Musi* holding as being “too vague to be practically applied, [] inconsistent with the purpose of the spot zoning doctrine, and produc[ing] inequitable and absurd results[.]” *Id.* at *3. This Court responded that “those arguments must be presented to the Supreme Court.” *Id.* “Just as *Musi* was bound to follow *Good Neighbors*, we are bound to follow *Musi*.” *Id.*

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In the case before us, the trial court stated:

In the matter *sub judice*, there is only one particular property owner, Applicant Matt Behe, who is receiving the special benefit of being allowed to narrowly carve out a small portion of the acreage owned by him, namely 2 out of 100 acres, in order to construct and operate a kennel/dog training facility.

The trial court appears to have determined that because Matt Behe is the sole owner receiving a special benefit, this is a spot zoning case. However, the definition of spot zoning requires a single owner of property, not a single person benefitting from the rezoning. Regardless, the tract of land in question was not owned by a single person when the application for rezoning was filed and when the BOC made its determination, rather it was jointly owned by Philip Behe and Matt Behe. Accordingly, as we too are bound to follow *Musi* and *Good Neighbors*, we hold that the rezoning did not constitute spot zoning as our courts have defined it.

The record shows that the BOC rezoned the two-acre tract from Residential Agricultural to Highway Commercial—Conditional District specifically to allow a kennel/dog training facility to operate as a permitted use on the land. This rezoning is classified as conditional use zoning. *Chrismon*, 322 N.C. at 618, 370 S.E.2d at 583 (citation omitted). “In order to be legal and proper, conditional use zoning, like any type of zoning, must be reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.” *Covington v. Town of Apex*, 108 N.C. App. 231, 235, 423 S.E.2d 537, 539 (1992) (quoting *Chrismon*, 322 N.C. at 622, 370 S.E.2d at 586). Again, the burden would be on the complaining party to show the zoning change to be invalid.

In their motion for summary judgment, plaintiffs argued that the rezoning was, among other things, unlawful, invalid, and void in that it was arbitrary and capricious, vague, and discriminatory. As such, the trial court was charged with reviewing the whole record to discern whether the BOC’s determination was supported by evidence showing a reasonable basis for the zoning change.

In reviewing the whole record, the trial court “is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law.” *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993) (citations omitted). “It is not the function of the reviewing court, in such

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a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board.” *Application of Campsites Unlimited, Inc.*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975); see *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 353, 578 S.E.2d 688, 691 (2003). Notably, “[t]he trial court, when sitting as an appellate court, to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.” *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (holding “[w]hen the petitioner questions (1) whether the agency’s decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test”). The trial court examines the whole record to determine whether the Board’s decision is supported by competent, material, and substantial evidence. *Id.* at 14, 565 S.E.2d at 17. In doing so, “the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency.” *Cumulus Broadcasting, LLC v. Hoke Cnty. Bd. of Comm’rs*, 180 N.C. App. 424, 426, 638 S.E.2d 12, 15 (2006) (citation and quotation omitted). Questions of law are reviewable *de novo*. *Id.*

Further, it is inappropriate for the trial court’s order to contain detailed findings of fact and conclusions of law in a case decided upon a summary judgment motion. *War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 551-52, 694 S.E.2d 497, 500 (2010); see N.C. Gen. Stat. § 1A-1, Rule 56 (2013). “The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is not appropriate when granting a motion for summary judgment” because “the basis of the judgment is that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Id.* (quotation and citation omitted). “By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings.” *Id.* at 552, 694 S.E.2d at 500. It is only appropriate for the trial court to recite those “uncontested facts” that form the basis of its decision. *Id.* “[A]ny findings should clearly be denominated as ‘uncontested facts’ and not as a resolution of contested facts.” *Id.*

Although not specifically designated as findings of fact, it is clear that the thirteen numbered paragraphs in the trial court’s order operate as such (#13 also operates as a conclusion of law). However, the order lacks any statement that findings were of “uncontested facts.” This is likely because at least two of the trial court’s findings were clearly

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not restatements of uncontested facts, but were statements weighing the evidence.

In its order, the trial court found:

11. There is a strong potential for noxious odors fouling the air, as well as sanitation issues; noise; increased traffic; the loss of the use and enjoyment of their property; the loss of property values; and, interference with their health, safety and general welfare. Some of these issues were not even addressed by the County or by the Applicant, e.g., the noise and health hazards associated with discharge of weapons involved in dog training activities, and the use of and disposal of birds involved in dog training activities.

12. The property was rezoned without any consideration of: (a) the impact upon the health, safety, and welfare on surrounding property owners of utilizing live birds in the training of the bird dogs; (b) the impact upon the health, safety, and welfare on surrounding property owners of utilizing and discharging firearms in the training of the bird dogs, including, the environmental impact of lead residue; (c) whether the use being contemplated by the Applicant for re-zoning was actually similar to the permitted use of a kennel, given the use as described was much different than the generally accepted definition of a kennel, being simply a location where dogs are housed on a temporary basis (the Court, noting that such a finding that the intended use was not sufficiently similar to any permitted use to treat it like the permitted use, would have required a determination that such use was prohibited, pursuant Section 8-4 of the Rockingham County Zoning Ordinance, [] (d) the need for protection to adjoining property; (e) the effects of the kennel/dog training use on property values; (f) general health, safety and general welfare and (g) benefits to the neighbors and the surrounding community.

In making these findings, the trial court has substituted its own judgment for that of the BOC. This is quite evident in finding 11, where the trial court states: “Some of these issues were not even addressed by the County[.]” The trial court’s sole charge was to review the BOC’s decision to see if it was supported by the evidence—it was not to weigh the evidence presented by one party (but not addressed by the other party) and then make a finding that there is “a strong potential” for certain

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negative outcomes if the zoning change is upheld. Further, several of the statements contained in finding 12 are unsupported by the record evidence. For example, there is evidence that the BOC considered the effect of the zoning change on surrounding property values by hearing evidence pertaining to environmental concerns—including lead—and noise concerns from gunfire and barking. It was blatantly incorrect for the trial court to assert that the property was rezoned “without any consideration of the above factors.”

In its summary judgment order, the trial court did not set forth its standard of review; it weighed the evidence; and it substituted its judgment for that of the BOC (and this is not a spot zoning case). As such, we believe the trial court lacked a fundamental understanding of the nature of a summary judgment proceeding, and we are confident that the summary judgment order should not be upheld. However, we do not have sufficient evidence before us to determine if summary judgment should have been granted in defendant’s favor. There is no transcript of the summary judgment proceeding in the record, and, thus, we have only an invalid summary judgment order before us for our review. We must reverse the trial court’s order and remand for a new summary judgment hearing.

b.) Lack of Proper Notice of Public Hearing on the Rezoning Amendment

[2] Defendant argues that the trial court erred in concluding that there was no genuine issue of material fact that certain abutting property owners did not receive notice of the BOC’s hearing as required by statute. We agree. Because this issue is likely arise on remand, we believe judicial economy is best served by addressing it on appeal.

Plaintiffs alleged in their complaint that defendant failed to notify all of the abutting landowners of the public hearing and failed to certify to the BOC that notice had been mailed to property owners in violation of N.C. Gen. Stat. § 160A-384(a).

We first note that N.C. Gen. Stat. § 160A-384(a) is applicable only in hearings placed before a city council, which is not what we have before us. N.C. Gen. Stat. § 153A-343 (2013) is the statute that outlines the notice requirement for hearings before the BOC. N.C. Gen. Stat. § 153A-343 requires the person or persons who mailed the notice of public hearing to all eligible property owners to certify to the BOC that the notifications were sent. N.C. Gen. Stat. § 153A-343(a). It further states that “such certificate shall be deemed conclusive in the absence of fraud.” *Id.*

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Here, Stacy Tolbert, Secretary to the Rockingham County Planning Board, certified to the BOC that she sent a Notice of Public Hearing on 28 June 2013 to thirty-three residences, including Ashley Wyatt's (Wyatt) and Keith Neal's (Neal), who both contend that they did not receive proper notice. The certification stated: "The following parties and abutting property owners to the application for Rezoning Case #2012-016 were forwarded legal notice by first class mail on June 28, 2013." Plaintiffs have not alleged any fraud in the mailing of the notices on the part of the County. In the absence of fraud, Ms. Tolbert's certification is deemed conclusive that defendant complied with the notice requirements. *See Rakestraw v. Town of Knightdale*, 188 N.C. App. 129, 135, 654 S.E.2d 825, 829 (2008). Accordingly, the trial court erred in concluding that there was no genuine issue of material fact that defendant failed to comply with the statutory notice requirement. The opposite is true—the record shows that notice was served to all proper parties in a timely fashion and properly certified to the BOC. Further, we note that Wyatt and Neal attended both the planning board meeting and the hearing before the BOC despite their claims.

c.) Section 15-2 of the Zoning Ordinance

[3] Defendant argues that the trial court erred in concluding that there was no genuine issue of material fact that Matt Behe violated Section 15-2 (a) of the Zoning Ordinance by pouring a concrete pad on the two-acre tract for use by his personal dogs prior to submitting his rezoning application. We agree.

We note that plaintiffs' complaint fails to allege a violation of Section 15-2(a) of the Zoning Ordinance in their motion for declaratory judgment. Nonetheless, the trial court has included Matt Behe's purported violation of this section as part of its basis for the summary judgment award in favor of plaintiffs. The trial court's order provides: "The record reveals that the Applicant began excavation and installation of the structure intended for use under the rezoning before securing the zoning permit from the defendant as specifically prohibited under the Zoning Ordinance at Section 15-2 (a)."

Section 15-2 (a) of the Zoning Ordinance provides, in pertinent part, that "[b]efore commencing the construction . . . of any . . . structure, . . . a zoning permit for the same shall be secured from the Zoning Administrator." At the Planning Board hearing, Matt Behe stated that he had previously poured a concrete pad on the two-acre tract for use by his personal dogs. He recognized that if the rezoning were granted, the reconstruction of the pad as the foundation for the dog-training building

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would require a permit. There is no evidence that Matt Behe, as applicant, failed to obtain or comply with all required permits and approvals. It appears, once again, that the trial court weighed the evidence instead of simply reviewing the whole record before it.

III. Conclusion

In sum, we decline to rule on whether the trial court erred in granting summary judgment in favor of plaintiff because the trial court's order and the record before us is insufficient to allow us to make that determination. Instead, we reverse the trial court's order and remand for a new summary judgment hearing. At the subsequent hearing, the trial court is to review the whole record to discern whether the BOC's zoning decision was reasonable and supported by the record. Because this case does not involve spot zoning, the burden is on plaintiff to show that the zoning change was invalid.

REVERSED AND REMANDED.

Judge CALABRIA concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

DILLON, Judge, concurring in part and dissenting in part.

The majority concludes that the action taken by the County in rezoning the two-acre tract of land owned by Phillip and Matt Behe (the "Property") did not constitute spot zoning. The majority further concludes that the record is insufficient to allow this Court to determine whether summary judgment was appropriate for either party. Accordingly, the majority orders that the trial court's order granting summary judgment be reversed and that the matter be remanded for a new hearing, with the burden on the plaintiffs to show that the rezoning of the Property was invalid.

I believe that the County's action *did* constitute spot zoning, and, therefore, the burden is *not* on the plaintiffs to show that the rezoning was invalid, but rather the burden was on the County to make a "clear showing that there was a reasonable basis for its decision" to rezone the Property. *Good Neighbors v. Town of Denton*, 355 N.C. 254, 259, 559 S.E.2d 768, 772 (2002). However, I further believe that the County met its burden, and, therefore, my vote is to reverse the order of the trial

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court granting summary judgment and remand with instructions to enter summary judgment for the County.

The majority holds that we are compelled by our Supreme Court's decision in *Good Neighbors*, *supra*, and our Court's decision in *Musi v. Town of Shallotte*, 200 N.C. App. 379, 684 S.E.2d 892 (2009) to conclude that the County's action did not amount to spot zoning because the Property is owned by two individuals (a father and son) rather than by "a single person." I disagree.

I recognize that our Supreme Court has used the phrase a single "tract owned by a single person" as part of a definition of spot zoning, *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1975), a phrase which has been repeated in subsequent cases, *see Chrismon v. Guilford County*, 322 N.C. 611, 627, 370 S.E.2d 579, 588 (1988); *Musi*, 200 N.C. App. at 382-83, 684 S.E.2d at 895, and, therefore, I understand how the majority reached its conclusion in the present case. I do not believe, however, that the Supreme Court intended by the use of this phrase to fashion a definitive rule whereby the question of whether the rezoning of a single tract of land constitutes "spot zoning" turns on whether that tract is owned by a single person rather than by two people. Such a rule would allow a landowner to avoid the spot zoning analysis simply by conveying a partial interest in his land to a "straw" entity. Rather, by its use of the phrase "by a single person" in certain opinions, I believe the Supreme Court was merely describing *an example* of spot zoning, as was the case in *Chrismon*. Indeed, in both *Good Neighbors* and *Blades*, the tract involved was *not* owned by a "single person" but rather by a corporation, made up of multiple individuals¹. *See Good Neighbors*, *supra*; *Blades*, *supra*.

I note that the Supreme Court has never expressly held – in *Good Neighbors* or otherwise – that a rezoning of a single tract did not constitute spot zoning simply because the tract was owned by multiple individuals. Rather, the Supreme Court recently avoided reaching this question. *Wally v. City of Kannapolis*, 365 N.C. 449, 722 S.E.2d 481 (2012). Further, the

1. By way of example, if the City of Raleigh granted my request to rezone my single-family residential lot to commercial, it makes no sense that the rezoning of my lot would not be subject to the spot zoning analysis by a reviewing court simply because I happen to own my house with my wife. Alternatively, however, if the City granted the rezoning request of my unmarried neighbor, the City's decision *would be* subject to the spot zoning analysis. Of course, under the majority's analysis, my neighbor could avoid the spot zoning analysis by setting up a "straw" entity and conveying a small interest in his house to that entity before making his rezoning request.

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Musi decision from our Court is clearly distinguishable from the present case in that *Musi* involved the rezoning of *fifteen* separate tracts of land which were not all owned by the same group of individuals. 200 N.C. App. at 383, 684 S.E.2d at 895.

Notwithstanding that I conclude that the rezoning in the present case does constitute spot zoning, I also conclude that the spot zoning was legal. *Chrismon*, 322 N.C. at 627-28, 370 S.E.2d at 588-89 (stating that not all spot zoning is illegal). That is, I believe that the County met its burden of clearly showing a reasonable basis for its decision by demonstrating that the rezoning was compatible with the existing zoning, that the benefits outweighed any detriments for the neighbors and the community, and that the new zoning was consistent with the County's long range plans.

On the other issues raised in this appeal, I agree with the majority that there is no issue of fact that all proper parties *did* receive adequate notice of the proceeding and that Matt Behe did not violate any zoning ordinance when he poured a concrete pad on the Property.

Accordingly, my vote is to reverse and remand with instructions to enter summary judgment in favor of the County.

HOUSE OF RAEFORD FARMS, INC., PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES, RESPONDENT

No. COA15-47

Filed 21 July 2015

1. Environmental Law—burden of proof—discharge of material—bound by prior decisions

The trial court did not err by placing the burden of proof on petitioner House of Raeford to prove it did not discharge material into Cabin Branch Creek, rather than requiring the North Carolina Department of Environment and Natural Resources to prove the allegations. A panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.

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2. Penalties, Fines, and Forfeitures—civil penalty—dumping waste material—remand for eight statutory factors

Although petitioner farm contended that it did not violate the provisions of N.C.G.S. § 143-215.1(a)(6) by dumping waste material into Cabin Branch Creek, and upholding the assessment of a civil penalty, this issue was remanded to the superior court with instructions to remand to the finder of fact, to make specific findings with regard to the eight statutory factors set forth in N.C.G.S. § 143B-282.1(b) and to formulate the amount of any civil penalty to be imposed.

3. Penalties, Fines, and Forfeitures—civil penalty—fined twice for same violation

The superior court did not err by determining that petitioner House of Raeford was fined “twice for the same violation,” under N.C.G.S. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c), and assessing only one civil penalty. The superior court properly reviewed and ruled the Environmental Management Commission Final Decision and assessment of the two additional maximum civil penalties was error.

Appeals by Petitioner and Respondent from Judgment entered 30 May 2014 by Judge John E. Nobles, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 1 June 2015.

Jordan, Price, Wall, Gray, Jones & Carlton, by Henry W. Jones, Jr. and Lori P. Jones, for Petitioner.

Attorney General Roy Cooper, by Special Deputy Attorney General Mary L. Lucasse, Special Deputy Attorney General Anita LeVeaux, and Special Deputy Attorney General Jennie Wilhelm Hauser, for Respondent.

TYSON, Judge.

Petitioner, House of Raeford Farms, Inc. (“House of Raeford”), and Respondent, North Carolina Department of Environment and Natural Resources (“DENR”), each appeal from the superior court’s judgment affirming in part and reversing in part the Final Agency Decision of the Environmental Management Commission (“EMC”). We affirm in part and remand in part.

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[242 N.C. App. 294 (2015)]

I. Background

House of Raeford operates a chicken processing facility near Rose Hill in Duplin County, North Carolina. This facility includes an engineered or designed system to treat the wastewater used during processing. Solids are carried by water outside of the plant to a diffused air flotation system. Solid materials are separated from the water, pumped into a tanker trailer, and transported to a plant operated by another company.

The remaining wastewater is pumped to House of Raeford's primary wastewater lagoon ("Lagoon 1"), which is approximately 795 feet long and 329 feet wide. House of Raeford adds approximately one million gallons of wastewater per day into Lagoon 1. The Lagoon has a design capacity of seven to eight million gallons.

At Lagoon 1, the remaining solid material separates from the water. The skimmed wastewater is gravity fed into a second lagoon ("Lagoon 2"), where it settles further. Wastewater from Lagoon 2 is later pumped approximately two miles to yet a third lagoon to further settle ("Lagoon 3"). House of Raeford applies water from Lagoon 3 to its spray fields. Lagoon 1 is located closest to House of Raeford's processing facility. Lagoon 2 is located directly behind Lagoon 1.

Cabin Branch Creek flows behind the House of Raeford facility and is located very close to Lagoon 2. The creek flows through two ponds, which are former limestone quarries, and eventually joins with Beaverdam Branch Creek. The Cabin Branch Creek drainage basin, which contributes to the flow of the creek behind House of Raeford, encompasses approximately 5.6 miles.

Valley Protein (a/k/a Carolina By-Products) is a rendering facility, which accepts offal from House of Raeford and other animal processing facilities and transforms the offal into other useable products. Valley Protein, along with Duplin Winery, are located upstream from the House of Raeford facility in the Cabin Branch Creek drainage area. Parker Bark, a mulch facility, is located adjacent to the House of Raeford property. Hog and cattle farms are also located within the Cabin Branch Creek drainage basin. Cabin Branch Creek is classified by DENR as swamp waters, which are characteristically wide, shallow, and slow flowing, and fed by wetlands and low-lying areas.

On 9 September 2009, DENR's Division of Water Quality ("DWQ"), Wilmington Regional Office, received an anonymous complaint about an odor emanating from Beaverdam Branch Creek. The following morning, two DENR representatives, Linda Willis ("Willis"), an environmental

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engineer, and Geoffrey Kegley ("Kegley"), a hydrogeologist, investigated the source of the odor. Willis and Kegley observed a "greasy, brown film" on Beaverdam Branch Creek where the creek crosses Brooks Quinn Road. As a result of this observation, Willis and Kegley began to investigate Beaverdam Branch Creek and its tributaries upstream from Brooks Quinn Road.

Willis and Kegley first investigated two hog farms' lagoons located along one of the tributaries. They determined neither farm was the source of the film on the creek. Willis testified she inspected the hog waste lagoons, observed no "overtopping" and noted the adjacent ditches were dry. Willis also testified she would have seen something in the ditches adjacent to the hog waste lagoons if there had been any problems with the lagoons. She further testified nothing was floating on the surface of the tributary adjacent to the hog farm lagoons.

Just downstream from the House of Raeford facility, Willis and Kegley observed a "floating, brown, sludge-type, greasy biomass" on the surface of Beaverdam Branch Creek. They then visited two sites located upstream from the House of Raeford facility: one on Cabin Branch Creek and the other on an unnamed tributary. Willis and Kegley did not observe any similar material in the water at either of these sites. Dissolved oxygen levels in the Cabin Branch Creek area upstream from the House of Raeford facility were in compliance with the water quality standards for swamp waters.

Willis and Kegley then drove to the House of Raeford facility. Joe Teachey ("Teachey"), the person responsible for the wastewater operations, met with them and escorted them behind the facility to view Cabin Branch Creek. Willis testified, "the creek was just full of sludge from bank to bank and as far as the eye could see. It was an unbelievable site."

She testified the sludge was fresh because it was a light tan color: "It starts out looking like a milkshake and then as it decomposes, it gets [darker] because of the septicity[.]" The sludge adhered to the shorelines and was so thick on the surface of the water that it had formed ridges. The sludge was darker and thinner downstream from the House of Raeford facility.

Willis testified the sludge in the creek appeared similar to the sludge in House of Raeford's Lagoon 1. Willis walked upstream to the adjacent property line. At that location, the water was clear and reflective.

On 17 September 2009, DENR collected fecal samples from Cabin Branch Creek, directly behind the House of Raeford facility. The

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analysis of the samples confirmed a fecal coliform density greater than 60,000 colonies per 100 milliliters. As a result of the contamination, the designated uses for the swamp waters below the House of Raeford facility were deemed to be impaired.

No direct or physical evidence was presented which tended to show that House of Raeford had discharged sludge into the creek. DENR did not gather or perform any tests on the sludge or material in the creek to determine whether it was the same material contained in House of Raeford's lagoons.

Evidence was presented that House of Raeford had made repairs to the lagoon system in early September 2009. An elevation change between the topography of the lagoons allows water to flow through a pipe from Lagoon 1 to Lagoon 2. These flows are controlled by a valve, which is opened by physically turning a wheel. In early September 2009, the valve and pipe were replaced. Teachey testified that he began to lower the level of Lagoon 1 approximately a week to ten days before construction began on the repairs. Teachey was able to lower the water level of Lagoon 1 by approximately one foot. The construction and repairs on the pipe and valve occurred between 8 September 2009 and 11 September 2009.

On 15 September 2009, Ms. Willis met with Clay Howard, the operations manager for House of Raeford, and a representative from the Environmental Protection Agency. Mr. Howard retained Register's Septic Tank Pumping, operated by Kenneth Register, to remove the material from Cabin Branch Creek, behind the House of Raeford facility. Mr. Register used a hose to pump material from the creek into his tanker truck, drove to Lagoon 1, and deposited the material therein. Register pumped approximately one million gallons of material, consisting of ninety-percent water, from the creek and deposited it into House of Raeford's Lagoon 1. House of Raeford paid Mr. Register \$20,000.00.

Jeffrey O. Poupart, the Point Source Branch Chief for DENR's Division of Water Quality, testified that it is "unheard of" for a company to accept unknown contaminants, such as sludge, into lagoons without first characterizing the contaminant. He stated that unknown contaminants are not accepted due to the risk of causing an imbalance in the lagoon's biological system, as well as the liability risk of accepting potentially hazardous or restricted materials.

Other testimony stated only two facilities in the creek basin area produce a floating sludge, Valley Protein and House of Raeford. DENR ruled out Valley Protein as a source of the creek sludge, because it is

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located several miles upstream from the site of contamination. No sign of sludge was observed upstream from the House of Raeford facility. DENR also excluded the other possible sources: Duplin Winery, Parker Bark, cattle farms, and hog farms.

Willis testified that, as a result of her investigation, she concluded House of Raeford had lowered the level of Lagoon 1 by pumping the material directly into the creek to accommodate the repair work to the pipe and valve. No physical evidence, such as tire tracks, pipe lanes, spills, or soil disturbance, was presented to show the material was pumped or that a truck hauled sludge from the lagoon to the creek. A ditch runs parallel to the lagoons. Except at the location where the ditch meets the creek, no evidence was presented to show sludge or waste was present in the ditch. In spite of the lack of any direct or physical evidence, DENR concluded House of Raeford had contaminated the creek.

In January of 2011, House of Raeford retained James K. Holley, PG, a hydrogeologist, to perform an independent review of possible causes of the contamination. Mr. Holley was tendered and testified, without objection, as an expert in the field of hydrogeology. He testified there was evidence of potential upstream contributors to the conditions observed in Cabin Branch Creek in September 2009. That evidence included past reports and notices of violation from DENR regarding illicit discharges at both Valley Protein and Duplin Winery.

Mr. Holley also testified that certain physical characteristics of Cabin Brank Creek could explain the natural accumulation of material behind the facility. The area of the creek behind the House of Raeford facility serves as a natural trapping point for materials flushed downstream. Immediately downstream from the facility, the creek contains numerous fallen trees and sharp turns, which serve as physical impediments to the water flow and debris carried downstream. The narrow stream channel behind House of Raeford enters an abandoned limestone quarry pond. As water exits this narrow stream and enters the large pond feature, the velocity of the flow drops, which causes the flow to slow and back up. In Mr. Holley's expert opinion, it is possible for matter to accumulate over a period of time at this "natural trapping point" from the release of materials further upstream, and naturally occurring debris in the creek.

Mr. Holley also testified that beavers create significant drainage problems for creeks like Cabin Branch. Beavers build dams, which cause water to slow, pond, trap debris, and stagnate. A couple of months earlier, on 16 June 2009, the Natural Resources Conservation Service had sent a letter to DENR that indicated "the volume of standing water

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in this drainage system has been improved by removal of beavers and beaver dams obstructing the flow of water. The Beaver Management Assistance Program (BMAP) was employed to trap the creek from the railroad to HWY 117.” This area of the BMAP eradication of beaver dams is downstream from Valley Protein, but upstream from House of Raeford.

In addition, Mr. Holley testified low volumes of rainfall occurred from July until early August 2009, and the ground was dry. In August, two significant rainfalls occurred, which raised the water levels, mobilized and trapped upstream material, and flushed it downstream. In Mr. Holley’s expert opinion, the material in the creek behind House of Raeford could have accumulated over a period of days, weeks or months.

On or about 10 August 2010, DENR issued a Findings and Decision and Assessment of Civil Penalties against House of Raeford arising out of the alleged discharge into Cabin Branch Creek. DENR assessed total civil penalties against House of Raeford in the amount of \$75,000.00, plus enforcement costs of \$1,357.95 as follows: (1) a penalty of \$25,000.00 was assessed for an alleged violation of N.C. Gen. Stat. § 143-215.1(a)(6). DENR asserted House of Raeford caused or permitted waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications, or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the EMC; (2) a penalty of \$25,000.00 was assessed for violation of 15A N.C.A.C. 2B.0211(3)(b) for violating the dissolved oxygen water quality standard for Class C-Sw waters of the State; and, (3) a penalty of \$25,000.00 was assessed for violation of 15A N.C.A.C. 2B.0211(3)(c) for allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State.

House of Raeford timely filed a petition for a contested case hearing. These hearings took place on various dates between 25 October 2011 and 20 December 2011. On 30 May 2012, the administrative law judge (“ALJ”) issued his recommended decision, which: (1) upheld the imposition of a \$25,000.00 fine for violation of N.C. Gen. Stat. § 143-215.1(a)(6); (2) found that imposition of both \$25,000.00 fines for violations of 15A N.C.A.C. 2B.0211(3)(b) and 15A N.C.A.C. 2B.0211(3)(c) respectively, were improper and in error; and, (3) reduced the enforcement costs charged against House of Raeford from \$1,357.95 to \$452.65.

House of Raeford and DENR both submitted exceptions and objections to the ALJ’s recommended decision and requested oral argument

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before the EMC. On 8 October 2012, the EMC, by a divided majority vote, issued its Final Agency Decision. The majority adopted in part and rejected in part the recommended decision of the ALJ. The EMC imposed a total civil penalty of \$50,000.00 and enforcement costs of \$905.30 against House of Raeford for violation of N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c).

On 9 November 2012, House of Raeford timely filed a Petition for Judicial Review of the Decision in the Duplin County Superior Court. A hearing was held on 14 April 2014. On 30 May 2014, the court agreed with the ALJ, imposed a single \$25,000.00 fine for violation of N.C. Gen. Stat. § 143-215.1(a)(6) and enforcement costs of \$452.65, and issued a Judgment on Judicial Review. DENR appeals, and House of Raeford cross-appeals.

II. Issues

House of Raeford argues the superior court erred by: (1) allocating the burden of proof to House of Raeford, rather than DENR; and, (2) concluding that House of Raeford violated N.C. Gen. Stat. § 143-215.1(a)(6).

DENR argues the superior court erred by: (1) reversing the Commission's decision upholding DENR's assessment of two \$25,000.00 civil penalties and costs against House of Raeford for violating its non-discharge permit and violating water quality standards for settleable solids or sludge; and, (2) failing to defer to the Commission's decision upholding DENR's assessment of more than one civil penalty.

III. Standard of Review

The superior court's review of the EMC's Final Agency Decision is governed by N.C. Gen. Stat. § 150B-51, which provides:

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

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(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2013); *see also* N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004) (An agency's Final Decision may be reversed or modified "only if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's findings, inferences, conclusions, or decision [fall into one of the six categories listed in § 150B-51(b)]."). "This Court's scope of review is the same as that employed by the trial court." *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 702, 635 S.E.2d 442, 446 (2006), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 445 (2007). "Under the *de novo* standard of review, the trial court consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

Under the whole record test

the trial court may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

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Overcash, 179 N.C. App. at 703, 635 S.E.2d at 446-47 (citation and internal quotation marks omitted).

IV. Burden of Proof

[1] House of Raeford argues the trial court improperly placed the burden of proof on House of Raeford to prove it did not discharge the material into Cabin Branch Creek, rather than requiring DENR to prove the allegations. We disagree.

The superior court concluded:

7. The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so. *Peace v. Empl. Sec. Com'n of N.C.*, 349 N.C. 315, 507 S.E.2d 272 (1998) citing *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Generally, a Petitioner bears the burden of proof on the issues. To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." *Britthaven v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E. 2d 455, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995). Petitioner in this case carries the burden of proof.

N.C. Gen. Stat. § 150B-23(a) provides:

A contested case shall be commenced by . . . filing a petition with the Office of Administrative Hearings [I]f filed by a party other than an agency, [the petition] shall state facts tending to establish that the agency named as the respondent . . . has ordered the petitioner to pay a fine or civil penalty . . . and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;

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- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-29(a) (2013); *see also* N.C. Gen. Stat. § 150B-29(a) (2013) (“The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence.”).

In *Overcash*, this Court explained:

While neither of these statutes specifically allocates the burden of proof, this Court held in *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (emphasis omitted), *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995), that ‘the ALJ is to determine whether the petitioner has met its burden in showing that the agency’ acted or failed to act as provided in § 150B-23(a) (1)-(5). Likewise, in *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 608, 627 S.E.2d 326, 337 (2006) [*rev'd on other grounds*, 361 N.C. 531, 648 S.E.2d 830 (2007)], this Court observed that ‘caselaw holds that unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases.’ Applying this principle, the Court concluded that the petitioner – and not DENR – bore the burden of proving the violations specified in N.C. Gen. Stat. § 150B-23(a). *Holly Ridge*, 176 N.C. App. at 608, 627 S.E.2d at 337. In short, this Court has already held that the burden of proof rests on the petitioner challenging an agency decision.

Overcash, 179 N.C. App. at 704, 635 S.E.2d at 447.

We are bound by our prior decisions in *Overcash*, *Britthaven*, and *Holly Ridge*, and hold the trial court did not err in its allocation of the burden of proof. “[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This argument is overruled.

V. Violation of N.C. Gen. Stat. § 143-215.1(a)(6)

[2] House of Raeford asserts the superior court erred by concluding it violated the provisions of N.C. Gen. Stat. § 143-215.1(a)(6) by dumping waste material into Cabin Branch Creek, and upholding the assessment of a civil penalty.

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House of Raeford argues: (1) no substantial evidence shows a similarity between the sludge in the lagoon and the material in the creek; (2) no substantial evidence supports the finding that there was no sludge upstream from the House of Raeford facility, and ruling out of other possible sources of the sludge; (3) House of Raeford's allowance of the material from the creek into its lagoon should not be considered as an admission of it being the source of the sludge; and, (4) DENR presented no evidence to show how material could have moved from House of Raeford's lagoon into the creek.

DENR's conclusion that House of Raeford dumped sludge into Cabin Branch Creek was based upon wholly circumstantial evidence. "It has long been the law in our state that circumstantial evidence may be used, and is highly satisfactory in matter of gravest moment[.]" *State v. Cummings*, 267 N.C. 300, 301, 148 S.E.2d 97, 98 (1966). Testimony was presented that (1) the creek directly behind the House of Raeford facility contained a large volume of sludge; (2) the material in the creek was visually similar to the material in House of Raeford's Lagoon 1; (3) the sludge in the creek appeared to be fresh; (4) the creek was clear upstream from the House of Raeford facility; (5) House of Raeford paid \$20,000.00 to pump the sludge from the creek into its lagoon and it is "unheard of" for a company to accept unknown contaminants into its wastewater system; (6) House of Raeford lowered the level of Lagoon 1 to accommodate repairs within a week of the discovery of the sludge in the creek; and, (7) DENR's investigation ruled out other possible upstream sources for the sludge.

We recognize the ALJ and EMC tribunals have "unchallenged superiority to act as finders of fact." *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (citation omitted). Where there are two conflicting views, this Court should not substitute our judgment for that of the agency's, even though this Court "could reasonably have reached a different result had [we] reviewed the matter *de novo*." *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 447 (citation omitted). Circumstantial evidence was presented by DENR which tended to show House of Raeford caused or permitted waste to be discharged into Cabin Branch Creek without an applicable permit and in violation of N.C. Gen. Stat. § 143-215.1(a)(6) and the water quality standards. *Id.* at 702, 635 S.E.2d at 446.

N.C. Gen. Stat. § 143-215.6A(a) allows a civil penalty up to a maximum of \$25,000.00 per violation, to be assessed for violations of the eleven enumerated restrictions set forth in the statute. In assessing the amount of the civil penalty, the factors set forth in N.C. Gen. Stat. § 143B-282.1 *shall* be considered:

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- (1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
- (2) The duration and gravity of the violation;
- (3) The effect on ground or surface water quantity or quality or on air quality;
- (4) The cost of rectifying the damage;
- (5) The amount of money saved by noncompliance;
- (6) Whether the violation was committed willfully or intentionally;
- (7) The prior record of the violator in complying or failing to comply with programs over which the Environmental Management Commission has regulatory authority; and
- (8) The cost to the State of the enforcement procedures.

N.C. Gen. Stat. § 143B-282.1(b) (2013).

Jeffrey Poupart, the Point Source Branch Chief for DENR's Division of Water Quality, made "findings of fact" and "conclusions of law" and assessed three maximum civil penalties against House of Raeford. Poupart oversees the permitting and compliance for all point source wastewater facilities in the State.

Poupart's decision does not state, with any specificity, facts to support consideration and application of the factors set forth in N.C. Gen. Stat. § 143B-282.1(b). In Poupart's decision, he states he "considered" these factors set forth in the statute, and then lists the statutory factors.

The ALJ's decision contains only one finding of fact pertaining to these statutory factors:

64. The test results performed by DWQ in September 2009, throughout the drainage basin for Cabin Branch Creek, from its headwaters to the downstream reaches, showed low [dissolved oxygen] levels *that could not be assigned to the presence of the matter found in the creek behind the [House of Raeford] facility. Low dissolved oxygen was a systematic problem throughout Cabin Branch and its tributaries.* (Emphasis supplied).

In its Final Agency Decision, the EMC incorporated all of the ALJ's findings of fact verbatim, with the addition of the finding that the cost of

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DWQ's investigation and monitoring of the water quality totaled \$1,357.95. The superior court also adopted the findings of the ALJ verbatim.

Poupart testified before the ALJ regarding his assessment of the eight statutory factors. Poupart testified the sludge behind the facility covered the stream from bank to bank, inhibiting the movement of aquatic life, and causing a "severe[] adverse affect on [the] water environment." The dissolved oxygen in the creek was "very depressed for 13 days" and unable to support the ecosystem, and the water in the creek was septic for a significant stretch downstream from the facility. Poupart also testified of at least twenty-five other civil penalty assessments against House of Raeford in the five years preceding the violation, which was a "significant factor" in the penalty assessment. He did not testify regarding the details of the twenty-five past violations. Poupart referenced a spreadsheet which summarized the past violations. None of the finders of fact made any findings regarding House of Raeford's past violations. Poupart further testified that the cost to the State for enforcement procedures was "moderately significant."

House of Raeford was assessed the maximum statutory penalty. The record shows that DENR discovered the material in the creek on 9 September 2009, and met with a representative from House of Raeford. That same day, House of Raeford contracted with a company to pump the material from the creek into House of Raeford's Lagoon 1. The record is unclear whether the pumping of the material began on 9 September or 14 September 2009. Nevertheless, the record clearly shows House of Raeford took timely action, upon the EPA's and DENR's request, to remove the material from the creek and placed it in its lagoon. No evidence shows there was any further remediation required or performed by anyone else, or there was any lasting or long-term impact on the creek. In assessing the civil penalty, DENR did not consider the \$20,000.00 House of Raeford had spent in pumping the material from the creek and into its lagoon.

The orders from the lower court and tribunals baldly state that Poupart "considered" the eight statutory factors in assessing the civil penalty, but contain no findings of fact to support these factors. Furthermore, Poupart's testimony before the ALJ contains bald statements regarding the environmental impact from the discharge. No evidence was presented tending to show the State spent significant funds to enforce the water quality regulations, or that any additional funds were expended, or should have been expended, to remediate the damage.

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In light of these considerations, we remand to the superior court with instructions to remand to the finder of fact, to make specific findings with regard to the eight statutory factors set forth in N.C. Gen. Stat. § 143B-282.1(b) and to formulate the amount of any civil penalty to be imposed.

VI. Duplicative Assessment of Civil Penalties

[3] DENR assessed civil penalties against House of Raeford as follows:

\$25,000 for violation of N.C. Gen. Stat. § 143-215.1(a)(6); causing or permitting waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of the Article.

\$25,000 for violation of 15A N.C.A.C. 2B.0211(3)(b); violating the dissolved oxygen water quality standard for Class C-Sw waters of the State.

\$25,000 for violation of 15A N.C.A.C. 2B.0211(3)(c); by allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State.

The ALJ found the imposition of civil penalties under 15A N.C.A.C. 2B.0211(3)(b) and 15A N.C.A.C. 2B.0211(3)(c) were erroneous, but upheld the imposition of the \$25,000.00 fine under N.C. Gen. Stat. § 143-215.1(a)(6). The EMC imposed a total maximum civil penalty of \$50,000.00 against House of Raeford for violation of N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c).

The superior court assessed a civil penalty of \$25,000.00 for violation of N.C. Gen. Stat. § 143-215.1(a)(6) for causing or permitting waste to be discharged into or intermixed with the waters of the State in violation of the water quality standard set forth in 15A N.C.A.C. 2B.0211(3)(c). DENR argues the superior court erred by determining that House of Raeford was fined “twice for the same violation,” and assessing only one civil penalty. We disagree.

The General Assembly has authorized the assessment of civil penalties of “not more than twenty-five thousand dollars” for eleven itemized violations based on acts or failures to act. N.C. Gen. Stat. § 143-215.6A(a)

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(1) – (11) (2013). The statute does not impose any limitation on the number of violations to be found as a result of an unauthorized discharge.

The violation of 15A N.C.A.C. 2B.0211(3)(b) related to the dissolved oxygen water quality standard is not at issue. The EMC concluded the penalty should be vacated, and DENR sets forth no argument related to that violation. DENR asserts that the civil penalties under N.C. Gen. Stat § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c) were assessed as a result of the same physical discharge of material into the creek, but each violation is based upon a separate act or failure to act. We disagree.

N.C. Gen. Stat. § 143-215.1(a)(6) provides that no person shall:

Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State *in violation of the water quality standards applicable to the assigned classifications* or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of this Article.

N.C. Gen. Stat. § 143-215.1(a)(6) (2013) (emphasis supplied). DENR specifically alleged House of Raeford had “violated N.C. Gen. Stat. § 143-215.1(a)(6) by causing or permitting a waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications.”

The second maximum penalty assessment was for “violation” of 15A N.C.A.C. 2B.0211(3)(c), a subsection of the North Carolina Administrative Code that sets forth water quality standards. Section 15A N.C.A.C. 2B.0211 is entitled “Fresh Surface Water Quality Standards for Class C Waters.” The regulation provides:

(3) Quality standards applicable to all fresh surface waters:

....

(c) Floating solids, settleable solids, or sludge deposits: only such amounts attributable to sewage, industrial wastes or other wastes as shall not make the water unsafe or unsuitable for aquatic life and wildlife or impair the waters for any designated uses.

15A N.C.A.C. 2B.0211(3)(c) (2011).

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In contrast to the language of N.C. Gen. Stat. § 143-215.1(a)(6), the regulation is not prohibitory, nor does it mandate some action. It merely sets forth the water quality standards for Class C waters. N.C. Gen. Stat. § 143-215.1(a)(6) allows for a penalty for violating the water quality standards set forth in 15A N.C.A.C. 2B.0211(3)(c). While under other circumstances there may be grounds to impose separate penalties associated with a single discharge, a violation of N.C. Gen. Stat. § 143-215.1(a)(6) does not exist without a violation of the water quality standard. The superior court properly determined the two penalties assessed by the EMC were duplicative and impermissible. This argument is overruled.

VII. Deference to the EMC's Decision

DENR asserts the superior court erred by failing to defer to the EMC's Final Agency Decision, which upheld DENR's assessment of two civil penalties based upon violations of N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c). DENR argues the superior court should have deferred to the EMC's Decision, wherein EMC interpreted its own regulations, and based on the EMC's expertise in administering the statutory program delegated to it by the General Assembly. We disagree.

DENR is vested with the statutory authority to administer the State's "program of water and air pollution control and water resource management." N.C. Gen. Stat. § 143-211(c) (2013). The EMC is responsible for promulgating rules and policies regulating the State's surface water resources. *See* N.C. Gen. Stat. §§ 143-214.1, 143-215.1, 143-215.6A (2013). "[A]n administrative agency's interpretation of its own regulation is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation." *Pamlico Marine Co. v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986).

Our Supreme Court explained:

Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the *validity of its reasoning*, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In re Appeal of N.C. Sav. & Loan League, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (emphasis supplied). "An agency interpretation of a

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relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 724, 670 S.E.2d 629, 635 (2009) (citation and quotation marks omitted).

The ALJ and the superior court both ruled that DENR improperly assessed duplicative penalties for discharging into the waters of the State in violation of N.C. Gen. Stat. § 143-215.1(a)(6), and for violating the water quality standard set forth in 15A N.C.A.C. 2B.0211(3)(c). The superior court properly reviewed and ruled the EMC Final Decision and assessment of the two additional maximum civil penalties was error. This assignment of error is overruled.

VIII. Conclusion

The superior court did not err in concluding that substantial circumstantial evidence was presented that House of Raeford violated the provisions of N.C. Gen. Stat. § 143-215.1(a)(6) by discharging material into the creek. The superior court properly concluded that imposition of two separate penalties under N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c) was in error.

We remand to the superior court with instructions to remand to the finder of fact for further findings regarding House of Raeford's actions, timeliness, and other evidence in light of the eight statutory factors set forth in N.C. Gen. Stat. § 143B-282.1(b), and for further consideration of the amount of any civil penalty to be imposed. The judgment of the superior court is affirmed in part, and remanded in part.

AFFIRMED IN PART, REMANDED IN PART.

Chief Judge McGEE and Judge GEER concur.

IN RE M.A.E.

[242 N.C. App. 312 (2015)]

IN THE MATTER OF M.A.E., K.M.E., AND E.G.H.

No. COA15-144

Filed 21 July 2015

1. Evidence—hearsay—out-of-court statements of abused child—trauma of testifying

In an action involving the alleged abuse and neglect of children, the trial court did not abuse its discretion by admitting the out-of-court statements of one of the children (Eve) under the residual hearsay exception in Rule 803(24). Although the trial court did not expressly find that Eve was unavailable to testify, the findings were consistent with the testimony of a mental health counselor who recommended that the child not be required to testify due to the resultant confusion, anxiety, and trauma.

2. Evidence—hearsay—out-of-court statement of abused child—circumstantial guarantees of trustworthiness

In an action involving the alleged abuse and neglect of children, the out-of-court-statements of one of the children (Eve) had circumstantial guarantees of trustworthiness. Inconsistencies have no bearing on hearsay statements circumstantial guarantees of trustworthiness. In determining that Eve's statements had circumstantial guarantees of trustworthiness, the trial court found that she was unable to testify at trial without hampering her progress in therapy; was motivated to speak the truth to both a DSS social worker and a forensic interviewer; and was competent because she could express herself and understood her duty to tell the truth.

3. Appeal and Error—admission of hearsay—other evidence—no prejudice—not reviewed

In an action involving the alleged abuse and neglect of children, the admission of hearsay statements from one of the children (Eddie) was not prejudicial to the adjudication of the children as abused was not reviewed on appeal. The trial court's findings and conclusions are supported by sufficient evidence independent of Eddie's statements.

4. Child Abuse, Dependency, and Neglect—disposition—children's emotional health considered—second ground of adjudication—not reviewed on appeal

A second theory of child abuse was not reviewed on appeal, despite the mother's contention that the additional ground for

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adjudication could affect the court's dispositional authority, where the facts that established the children's status as abused and the adjudication of neglect provided sufficient justification for the court to address their emotional health as a part of its disposition.

Appeal by respondent-parents from orders entered 21 October 2014 and 19 November 2014 by Judge Christine Underwood in Iredell County District Court. Heard in the Court of Appeals 29 June 2015.

Lauren Vaughan, for petitioner-appellee Iredell County Department of Social Services.

Melanie Stewart Cranford and Susan M. Ervin, for guardian ad litem.

Richard Croutharmel, for respondent-appellant mother.

Ryan McKaig, for respondent-appellant father J.E.

Mary McCullers Reece, for respondent-appellant father D.H.

CALABRIA, Judge.

Respondent-parents (collectively, "Respondents") appeal from an order adjudicating the minor children M.A.E. ("Eddie")¹ and K.M.E. ("Eve") abused and neglected juveniles and adjudicating the minor child E.G.H. ("Harriet") a neglected juvenile. We affirm.

I. Background

Respondent-mother ("Mother") is the mother of all three juveniles and is married to Respondent-father D.H. ("Respondent D.H."), who is Harriet's biological father.² At the time Iredell County Department of Social Services ("DSS") became involved with the family, the juveniles were living with Mother and Respondent D.H. in Iredell County. Respondent-father J.E. ("Respondent J.E.") is Eddie and Eve's biological father and Harriet's legal father, and he resides in South Carolina.

1. We adopt the pseudonyms used by the parties to preserve the juveniles' privacy.

2. We adopt the trial court's unchallenged finding that Respondent D.H. is Harriet's biological father.

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On 13 May 2013, DSS filed juvenile petitions seeking adjudication of twelve-year-old Eddie, eight-year-old Eve, and six-year-old Harriet as abused and neglected. According to Child Protective Services (“CPS”) reports, DSS alleged Eddie was sleeping on the streets “due to the fighting in the home” and Mother and Respondent D.H.’s alcohol abuse; that Respondent D.H.’s spankings left “marks and bruises” on Eddie and Eve; and that Eve had disclosed that Eddie repeatedly sexually abused her and Harriet. Eve reported, *inter alia*, that Eddie “takes his pants off and private out and puts it in her butt[,]” “sucks on her chest[,]” and that she “saw ‘goopy stuff’ come from his penis [and] onto [her] Teddy Bear.” A subsequent investigation by DSS confirmed that Eddie repeatedly sexually abused Eve and that Eve had reported the abuse to Mother, Respondent D.H., and Respondent J.E. Eddie admitted “that he put his ‘dick’ in [Eve’s] butt” but denied touching Harriet. Eddie also stated that Respondent D.H. “beat him bad recently leaving marks up and down his back[,]” and that Mother “was aware but did not do anything.”

On 10 May 2013, during an emergency assessment meeting at DSS, Respondents “admitted to having knowledge of the sexual abuse of the girls by [Eddie] but did nothing to protect them from the ongoing abuse.” The report stated that Respondents “admitted they did not report the abuse for fear that they would be arrested and the children would be removed from the home.” Moreover, “[n]umerous extended family members knew of the abuse as well but failed to report it or protect the children.” Mother and Respondent D.H. further acknowledged spanking the minor children, which had “on rare occasions left marks” on them, and they also acknowledged frequently arguing in their presence. As a result of its investigation, DSS obtained non-secure custody of the three children on 13 May 2013.

Prior to the adjudicatory hearing, DSS filed two motions seeking to introduce into evidence a series of hearsay statements made by the minor children:

- (1) Eve’s statements to DSS social worker Carol Roulhac (“Ms. Roulhac”) at Eve’s elementary school on 8 May 2013;
- (2) Eve and Harriet’s videotaped statements to forensic interviewer Colleen Medwid (“Ms. Medwid”) at the Dove House Children’s Advocacy Center on 9 May 2013;
- (3) Eve and Harriet’s statements to their Aunt, Peggy Brown (“Aunt Peggy”) at her home on various dates;

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- (4) Eddie's statements to Ms. Roulhac and Mooresville Police Detective John Vanderbilt ("Detective Vanderbilt") at Eddie's residence on 8 May 2013;³
- (5) Eddie's videotaped statements to Detective Todd Marcum ("Detective Marcum") and Detective Vanderbilt at the Mooresville Police Department ("MPD") on 9 May 2013;
- (6) Eddie's videotaped statements to Detective Marcum and Detective Amy Dyson ("Detective Dyson") at the MPD on 10 May 2013.

DSS sought introduction of the statements under the residual exception to the hearsay rule in N.C. Gen. Stat. § 8C-1, Rule 803(24).

After hearing the evidence and arguments of the parties, the trial court admitted the following statements pursuant to Rule 803(24): (1) Eve's statements to Ms. Roulhac at school on 8 May 2013; (2) Eve's statements to Ms. Medwid at the Dove House on 9 May 2013; (3) Eddie's statements to Ms. Roulhac and Detective Vanderbilt at his residence on 8 May 2013; and (4) Eddie's statements to Detectives Marcum and Vanderbilt at the MPD on 9 May 2013. The court found these statements possessed circumstantial guarantees of trustworthiness and were more probative on relevant issues than any other evidence available to DSS through reasonable efforts. It further found that their admission would serve the interest of justice. The court declined to admit Harriet's statements to Ms. Medwid at the Dove House, Eve and Harriet's statements to Aunt Peggy, and Eddie's 10 May 2013 statements to Detectives Dyson and Marcum, finding that they lacked both the indicia of trustworthiness and the probative value required for admission under Rule 803(24).

After an adjudicatory hearing, the trial court entered an adjudication order on 21 October 2014. The trial court concluded that Eddie and Eve were abused juveniles, "in that [their] parent . . . or caretaker has committed, permitted, or encouraged the commission of a sex offense [by,] with[,] or upon [them] in violation of the criminal law, and has created or allowed to be created serious emotional damage to the juvenile[s]." The trial court further concluded that each of the three minor children were neglected juveniles in that they do "not receive proper care, supervision, or discipline from [their] parent . . . or caretaker," and "live[] in an environment injurious to [their] welfare."

3. In the trial court's Order on Motion to Introduce Hearsay, Finding of Fact 32 misstates that this videotaped interview took place on 9 May 2013.

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After a dispositional hearing, the trial court entered a disposition order on 19 November 2014 continuing DSS custody of all three children. The trial court found that any visitation by Respondents would be contrary to the children's best interests "and will likely impede and/or cause a regression in the progress they have made in therapy." The court further determined that DSS should cease efforts toward reunification of the children with Respondents since such efforts "would be futile and . . . inconsistent with the juveniles' health, safety, and need for a safe permanent home within a reasonable period of time[,]" and that Respondents "have subjected these juveniles to aggravating circumstances as defined in N.C. [Gen. Stat.] § 7B-101(2)." *See* N.C. Gen. Stat. § 7B-101(2) (2013) (defining aggravated circumstances as "[a]ny circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including . . . sexual abuse."); *see also* N.C. Gen. Stat. §§ 7B-507(b)(1)-(2), 7B-905(c) (2013). Respondents appeal.

II. Arguments on Admission of Hearsay Under Rule 803(24)

On appeal, Respondents each challenge the trial court's use of Rule 803(24) to admit Eddie and Eve's hearsay statements into evidence. Specifically, Respondents contend that the trial court abused its discretion in determining that Eddie and Eve's statements (1) were more probative on the issue than any other evidence which DSS could procure through reasonable efforts and (2) had circumstantial guarantees of trustworthiness. Mother also contends that Eddie's statements to Detectives Marcum and Vanderbilt on 9 May 2013 fail to serve the interests of justice. Respondents, however, do not challenge the trial court's findings and conclusions that DSS provided proper notice of its intent to introduce Eve's statements; that the statements are not covered by another exception to the hearsay rule; or that the statements concern material facts relevant to adjudication.

III. Standard of Review and Applicable Law

Admission of evidence [under Rule 803(24)] is addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown. An abuse of discretion warranting reversal results only upon a showing that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision. The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred.

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Brissett v. First Mount Vernon Indus. Loan Ass'n, __ N.C. App. __, __, 756 S.E.2d 798, 803 (2014) (citations omitted) (internal quotations omitted). Therefore, “[w]e will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied.” *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988) (citation omitted), *disapproved on other grounds by State v. Jackson*, 348 N.C. 644, 652–53, 503 S.E.2d 101, 106 (1998).

“Hearsay” is defined as any “statement, other than one made . . . while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C–1, Rule 801(c) (2013). Our Rules of Evidence make hearsay inadmissible “except as provided by statute or by these rules.” N.C. Gen. Stat. § 8C–1, Rule 802 (2013). “Rule 803 of the Rules of Evidence . . . sets out the exceptions to the hearsay rule that apply regardless of the availability of the person making the statement.” *Little v. Little*, __ N.C. App. __, __, 739 S.E.2d 876, 879 (2013). Subsection 24 allows for the admission of

[a hearsay] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C–1, Rule 803(24). “The rule further requires that notice be given to the opposing party, ‘to provide the adverse party with a fair opportunity to prepare to meet the statement.’ ” *N.C. Dep’t of Transp. v. Cromartie*, 214 N.C. App. 307, 318, 716 S.E.2d 361, 368 (2011) (quoting N.C. Gen. Stat. § 8C–1, Rule 803(24)).

In *Smith*, our Supreme Court established the protocol for trial courts when deciding whether to admit hearsay under Rule 803(24).

The trial court must determine in this order:

- (A) Has proper notice been given?
- (B) Is the hearsay not specifically covered elsewhere?
- (C) Is the statement trustworthy?

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(D) Is the statement material?

(E) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?

(F) Will the interests of justice be best served by admission?

The trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness[.]

Deanes, 323 N.C. at 515, 374 S.E.2d at 255 (citing *State v. Smith*, 315 N.C. 76, 92–96, 337 S.E.2d 833, 844–46 (1985)).

IV. Eve's Statements

[1] Respondents each challenge the trial court's use of Rule 803(24) to admit Eve's out-of-court statements to both Ms. Roulhac on 8 May 2013 and to Ms. Medwid on 9 May 2013. They argue that the trial court abused its discretion by determining that Eve's statements were more probative on the issues than other evidence reasonably available to DSS and that her statements were sufficiently trustworthy. We disagree.

A. More Probative than Other Evidence Reasonably Available to DSS

Respondents D.H. and J.E. challenge the trial court's conclusion that Eve's statements are "more probative on the point for which they are offered than any other evidence which [DSS] can procure through reasonable efforts[.]" They contend that the trial court failed to properly consider Eve's availability to testify in person at the adjudicatory hearing.

As our Supreme Court has noted,

[a]lthough the availability of a witness is deemed immaterial for purposes of Rule 803(24), that factor enters into the analysis of admissibility under subsection (B) of that Rule which requires that the proffered statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." If the witness is available to testify at trial, the "necessity" of admitting his or her statements through the testimony of a "hearsay" witness very often is greatly diminished if not obviated altogether.

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State v. Fearing, 315 N.C. 167, 171–72, 337 S.E.2d 551, 554 (1985) (citations omitted) (internal quotations omitted).

In the instant case, the trial court made the following findings and conclusions:

10. It would be detrimental to the welfare of these juveniles to compel them to testify in court. They would likely suffer from anxiety, which could cause behavioral disruptions. The formality of the courtroom setting itself would likely be overwhelming, but being questioned by different attorneys over a long period of time, even in a closed-circuit situation would likely cause anxiety and negatively affect the juveniles in their placement, at school and in the social context. Further, causing these children to testify could hamper the progress they are making in therapy.

...

33. The proffered hearsay statements of [Eve] to Carol Roulhac on May 8, 2013 . . . and statements of [Eve] to Colleen Medwid on May 9, 2013 are more probative on the point for which they are offered than any other evidence which the proponent can procure through reasonable efforts due to the age, risk and bias of [Eve].

...

4. The following hearsay statements . . . have circumstantial guarantees of trustworthiness and are more probative on the point for which they are offered than any other evidence which [DSS] can procure through reasonable efforts: Statements of [Eve] to Carol Roulhac on May 8, 2013 . . . [and] to Colleen Medwid on May 9, 2013.

The findings in paragraph 10 are consistent with the testimony of Jodi Province (“Ms. Province”), Eve’s therapist and an expert in “mental health counseling for children under the age of ten[.]” Ms. Province “strongly recommend[ed]” that Eve not “be required to testify in this matter” due to the resultant confusion, anxiety, and trauma she would experience. Ms. Province was also concerned that Eve’s testimony would not be truthful because she “may feel guilt and maybe feel like she is getting someone in trouble and that she doesn’t want anyone to be in trouble.”

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Although the trial court did not expressly find Eve unavailable to testify, the evidence supports the court's determination that Eve's out-of-court statements are more probative than other evidence reasonably available to DSS.

B. Circumstantial Guarantees of Trustworthiness

[2] Respondents next argue that Eve's out-of-court statements do not have circumstantial guarantees of trustworthiness. We disagree.

As an initial matter, we reject Mother and Respondent J.E.'s contentions that the alleged inconsistencies in Eve's statements detract from their trustworthiness. Under Rule 803(24), such inconsistencies have no bearing on hearsay statements' "circumstantial guarantees of trustworthiness[.]" "The relevant circumstances in determining trustworthiness include only those that surround *the making of the statement.*" *State v. Waddell*, 351 N.C. 413, 422, 527 S.E.2d 644, 650–51 (2000) (citation omitted) (internal quotations omitted). As Respondents each note, "[t]he trial court *must not* consider the corroborative nature of the statement when determining whether it qualifies as residual hearsay." *State v. Champion*, 171 N.C. App. 716, 722, 615 S.E.2d 366, 371 (2005) (emphasis added). Therefore, any inconsistencies in Eve's statements are irrelevant in determining whether each statement has circumstantial guarantees of trustworthiness.

In assessing whether a declarant's statement "had circumstantial guarantees of trustworthiness equivalent to those present in an established exception to the hearsay rule[.]" the trial court must consider the following factors:

- (1) whether the declarant had personal knowledge of the underlying events,
- (2) whether the declarant is motivated to speak the truth or otherwise,
- (3) whether the declarant has ever recanted the statement, and
- (4) whether the declarant is available at trial for meaningful cross-examination.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003) (citing *State v. King*, 353 N.C. 457, 479, 546 S.E.2d 575, 592 (2001)). No single factor is dispositive. *Smith*, 315 N.C. at 94, 337 S.E.2d at 845. Rather, the court "should focus upon the factors that bear on the declarant at the time of making the out-of-court statement and should keep in mind

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that the peculiar factual context within which the statement was made will determine its trustworthiness.” *Id.* “[T]he issue is not whether [the declarant’s] statement is objectively accurate; the determinative question is whether [the declarant] was motivated to speak truthfully when he made it.” *State v. Sargeant*, 365 N.C. 58, 66, 707 S.E.2d 192, 197 (2011).

In the instant case, the trial court found that “[t]he circumstances surrounding the hearsay statements made by [Eve] to Social Worker Roulhac on May 8, 2013 . . . [and] at the Dove House [to Ms. Medwid on 9 May 2013] have circumstantial guarantees of trustworthiness.” The trial court supported this determination with detailed findings about the circumstances under which Eve made these statements. Although the court did not expressly address the four *Valentine* factors, this omission is not fatal. “If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court’s conclusion concerning the admissibility of a statement under a residual hearsay exception.” *Sargeant*, 365 N.C. at 65, 707 S.E.2d at 196. “We will review the record” and the trial court’s evidentiary findings to “make our own determination.” *Valentine*, 357 N.C. at 518, 591 S.E.2d at 853.

In addressing the *Valentine* factors, Respondents do not contest that Eve has personal knowledge of the events or that Eve never recanted her statements. Although Respondents D.H. and J.E. contend that the trial court did not make specific findings that Eve was unavailable for trial, we have already addressed and dismissed this argument. The trial court found, and Respondents do not challenge, that requiring Eve to testify would be “detrimental to [her] welfare” and “could hamper the progress [she is] making in therapy.” Accordingly, the record reveals sufficient evidence supporting the trial court’s determination that Eve was unavailable to stand trial.

Under the *Valentine* factors, Respondents have one remaining challenge to the circumstantial guarantees of trustworthiness of Eve’s hearsay statements: whether Eve was “motivated to speak the truth or otherwise” when she made her out-of-court statements to Ms. Roulhac and Ms. Medwid. *See Valentine*, 357 N.C. at 518, 591 S.E.2d at 852. Ms. Roulhac met with Eve in a private room at her school to ask her about a CPS report concerning allegations of domestic violence. During the interview, Ms. Roulhac asked Eve “if she knew the difference between a ‘good touch and a bad touch.’ ” Eve responded, “My brother [Eddie] came in my room last night and touched my butt[,]” and proceeded to describe his actions in more detail. The trial court found that Eve made these disclosures “in a comfortable and ‘safe’ environment[;]” that Ms.

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Roulhac “did not use leading questions” or “ask [Eve] many specific questions[;]” that Eve “spoke in a ‘very matter of fact’ manner” and “did not appear to be afraid or upset[;]” and that Eve “used age-appropriate language to discuss” the abuse. Therefore, we find that Eve was motivated to speak truthfully to Ms. Roulhac.

The trial court made similar findings regarding Eve’s videotaped statements to Ms. Medwid on 9 May 2013. The trial court noted Eve’s demeanor, her age-appropriate language, and the sensitive nature of her disclosures. The trial court also found that Ms. Medwid, a trained forensic interviewer, “adhered to the protocol” established by the Dove House, a “licensed and accredited child advocacy center[.]” We find that Eve was also motivated to speak truthfully to Ms. Medwid. Therefore, the trial court did not abuse its discretion in finding that Eve’s statements contained circumstantial guarantees of trustworthiness under a *Valentine* factors analysis.

In challenging the trial court’s finding that Eve’s statements contained circumstantial guarantees of trustworthiness, Mother contends that the trial court abused its discretion by finding Eve competent to stand trial without assessing whether she understood the difference between truth and fantasy. Mother contends that the trial court’s findings that Eve understood “the difference between a truth and a lie” but would be unlikely to “understand the concept of swearing on a Holy Bible” was “tantamount to passing on her competence to testify as a witness” and effectively resolved the dispositive issue in the case: “Eve’s veracity.” We disagree.

Our Rules of Evidence establish a presumption of competency under N.C. Gen. Stat. § 8C–1, Rule 601(a) (2013). The presumption may be rebutted by a showing that a witness is “(1) incapable of expressing himself or herself concerning the matter as to be understood . . . or (2) incapable of understanding the duty of a witness to tell the truth.” N.C. Gen. Stat. § 8C–1, Rule 601(b) (2013).

In order to assess circumstantial guarantees of trustworthiness, the court necessarily considers one’s ability to express herself and her understanding of truth. For example, the trial court found that Harriet’s statements at the Dove House lacked the guarantees of trustworthiness required by Rule 803(24), in part, because she “was extremely difficult to understand” and “did not appear to even understand what happened during the interview.”

Even so, there is sufficient evidence to support the trial court’s finding that Eve was competent to testify at trial, although we note that Eve

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did not testify. Eve was eight years old in May 2013. Ms. Province, Eve's therapist and an expert in "mental health counseling for children under the age of ten[,]” testified that Eve had the ability to remember and recant her experiences and also understand “the need to tell . . . the truth about what's happened[.]” Ms. Province further stated that children of Eve's age generally would not understand the “significance” of swearing on a Bible. Ms. Medwid described for the court the “truth/lie” technique she uses to determine whether a child who is at least six years of age is able to distinguish truth from falsity. In addition to employing this technique, Ms. Medwid asked Eve not to guess at a response if she did not know the answer to a question, and to correct Ms. Medwid if she said anything that was mistaken. Even without our presumption of competency, this is sufficient evidence that Eve was capable of expressing herself and understood the duty to tell the truth.

In determining that Eve's statements had circumstantial guarantees of trustworthiness, the trial court found that Eve was unable to testify at trial without hampering her progress in therapy; was motivated to speak the truth to both Ms. Roulhac and Ms. Medwid; and was competent because she could express herself and understood her duty to tell the truth.

The trial court properly analyzed the admissibility of Eve's statements under Rule 803(24). Therefore, the court did not abuse its discretion in determining that Eve's out-of-court statements were more probative on the issues than other evidence reasonably available to DSS, in finding circumstantial guarantees of trustworthiness in Eve's statements to Ms. Roulhac and Ms. Medwid, and in admitting Eve's out-of-court statements to Ms. Roulhac and Ms. Medwid at the adjudicatory hearing.

V. Eddie's Statements

[3] We decline to review the trial court's admission of Eddie's statements to Ms. Roulhac and Detective Vanderbilt on 8 May 2013, and his videotaped statements to Detectives Marcum and Vanderbilt at the police department on 9 May 2013 under Rule 803(24) for an abuse of discretion.

The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the court relied on the incompetent evidence in making its findings.

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Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence.

In re Huff, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000) (citations omitted) (internal quotation marks omitted).

In the instant case, the trial court's findings and conclusions are supported by sufficient evidence independent of Eddie's statements. Specifically, Eve's properly-admitted statements, Respondents' statements to Ms. Roulhac and law enforcement, and Eddie's adjudication of delinquency for second-degree rape and sexual offense support the findings in the adjudication order. Ms. Roulhac testified that Eve "disclose[d] that [Eddie] had touched her in her butt." During her interview with Ms. Medwid, she similarly described Eddie coming into her room, placing his penis inside her "private"—both her "front part" and her "butt"—and moving "up and down." Eve said that she showed Mother and Respondent D.H. the "gooey stuff" Eddie left on her blanket and that she complained to each of her parents about Eddie's sexual abuse on multiple occasions over a period of two years. In her statement to Detectives Dyson and Marcum, Mother acknowledged that Eve told her in 2012 that Eddie had taken her and Harriet into a closet, asked them to suck on his penis, and then "made [Harriet] do it." Respondent J.E. admitted that both Eve and Mother told him about Eddie "molesting his sisters[.]" Additionally, DSS introduced a copy of the trial court's 22 August 2013 order adjudicating Eddie delinquent based upon his admission to three counts of second-degree statutory rape under N.C. Gen. Stat. § 14-27.3 and three counts of second-degree statutory sexual offense under N.C. Gen. Stat. § 14-27.5 against his sisters. Therefore, we conclude that Respondents were not prejudiced by the admission of Eddie's hearsay statements and decline to review whether the trial court erred in admitting his statements.

VI. Adjudication of Abuse under N.C. Gen. Stat. § 7B-101(1)

Mother and Respondent D.H. claim that the trial court erred in entering adjudications of abuse as to Eddie and Eve. We disagree.

In reviewing the trial court's decision, we must determine whether the findings of fact are supported by clear, cogent and convincing evidence, and whether the findings support the court's conclusions of law. If there is competent evidence, the findings of the trial court are binding on appeal. An appellant is bound by any unchallenged findings of fact. Moreover, erroneous findings unnecessary to the determination do not constitute reversible

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error where the adjudication is supported by sufficient additional findings grounded in competent evidence. We review conclusions of law *de novo*.

In re B.S.O., __ N.C. App. __, __, 760 S.E.2d 59, 62 (2014) (citations omitted) (internal quotation marks omitted).

Our Juvenile Code defines an abused juvenile, *inter alia*, as one whose parent or caretaker

[c]ommits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; rape of a child by an adult offender, as provided in G.S. 14-27.2A; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; sexual offense with a child by an adult offender, as provided in G.S. 14-27.4A; second degree sexual offense, as provided in G.S. 14-27.5[.]

N.C. Gen. Stat. § 7B-101(1)(d) (2013). Mother and Respondent D.H. contend that neither the evidence nor the trial court's findings support adjudication under N.C. Gen. Stat. § 7B-101(1)(d). Mother asserts that "there was no 'clear and convincing' evidence that she, or either father, knew or had reason to know that Eddie had or would perpetrate a sex offense enumerated in N.C. Gen. Stat. § 7B-101(1)(d) against Eve." Respondent D.H. similarly contends that the "evidence did not show that [Respondents] committed, permitted[,] or encouraged Eddie to commit a sex offense on Eve." Mother and Respondent D.H. specifically challenge the trial court's finding 31 that they "were aware that [Eddie] was committing sexual assaults on [Eve] and failed to take appropriate remedial measures to ensure the child's safety."

In the instant case, the trial court made findings based on evidence regarding the allegations that Eddie repeatedly sexually abused Eve, even after Respondents learned of the abuse. The trial court found "that [Eddie] penetrated [Eve] anally with his penis on multiple occasions, even after [Mother] and [Respondent D.H.] learned of the abuse." Ms. Roulhac testified that Eve "disclose[d] that [Eddie] had touched her in her butt." During Eve's forensic interview with Ms. Medwid, Eve similarly described Eddie coming into her room, placing his penis inside her "private"—both her "front part" and her "butt"—and moving "up and down." Eve said that Eddie moved up and down either on or inside her "private" forty times and had put his penis inside her butt twenty times. Eve also told Ms. Medwid that "gooey stuff" came out of Eddie's penis

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and got onto her legs, blanket, and teddy bear. Ms. Medwid provided the trial court with the anatomical diagram Eve used to show what Eddie had done to her. These incidents began when Eve was six or seven years old and occurred at both the family's previous and current residences.

Detective Dyson testified that Eddie had been adjudicated delinquent "for the acts against his sisters[.]" DSS introduced a copy of the trial court's 22 August 2013 order adjudicating Eddie delinquent based upon his admission to three counts of second-degree statutory rape under N.C. Gen. Stat. § 14-27.3 and three counts of second-degree statutory sexual offense under N.C. Gen. Stat. § 14-27.5. A parent permitting either offense to be committed by or upon a minor child constitutes abuse under N.C. Gen. Stat. § 7B-101(1)(d). Therefore, there is sufficient evidence that Eddie repeatedly sexually abused Eve.

There is also evidence regarding the challenged finding that "[t]hese parents were aware that [Eddie] was committing sexual assaults on [Eve] and failed to take appropriate remedial measures to ensure the child's safety." Eve said that she showed Mother and Respondent D.H. the "gooey stuff" Eddie left on her blanket and that she complained to each of her parents about Eddie's sexual abuse on multiple occasions over a period of two years. Eve also told her grandmother, aunt, and uncle about the abuse.

In her statement to Detectives Dyson and Marcum, Mother acknowledged Eve told her in 2012 that Eddie had taken her and Harriet into a closet, asked them to suck on his penis, and then "made [Harriet] do it." Mother told Ms. Roulhac that Eve had complained of Eddie sexually abusing her on four occasions, and Mother expressed her concern that Harriet's bedwetting and developmental delays "were the result of Eddie sexually abusing her." Despite these concerns and Eve's repeated disclosures, Mother and Respondent D.H. admitted that "[Eddie]'s bedroom remained upstairs, right across from the girls' bedroom. That the parents' bedroom remained downstairs. They did not make any plans to put the girls in the room with them."

Mother explained to detectives that she was "scared" to contact DSS or the police because Respondent J.E. warned her she would be arrested. Respondent J.E. admitted that both Eve and Mother told him about Eddie "molesting his sisters[.]" He told Mother and Respondent D.H. not to "call law enforcement because [Eddie] is going to be charged and the kids are going to be removed from the home." Respondent D.H. claimed that his relatives told him to "keep it in house."

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This is sufficient evidence of Respondents' repeated disregard of Eve's disclosures. Therefore, we hold that the evidence and the trial court's findings fully support the trial court's conclusion that Eddie and Eve were abused juveniles, in that their parent or caretaker permitted Eddie to commit an act upon Eve pursuant to N.C. Gen. Stat. § 7B-101(1)(d). Specifically, we note Eve's 2012 disclosure to Mother of Eddie's oral penetration upon then-five-year-old Harriet; Eve's additional unheeded disclosures to each Respondent; Eve's statement that Eddie engaged in twenty acts of anal intercourse with her between 2012 and May 2013; and Eddie's admission to delinquency for three counts of second-degree statutory rape and three counts of second-degree statutory sexual offense against his sister. Therefore, we find that the trial court properly adjudicated Eddie and Eve as abused juveniles pursuant to N.C. Gen. Stat. § 7B-101(1)(d).

[4] Mother and Respondent D.H. also challenge the trial court's conclusion that Eddie and Eve were abused juveniles under N.C. Gen. Stat. § 7B-101(1)(e), in that their parent or caretaker "created or allowed to be created serious emotional damage to the juvenile[s.]" Because we uphold the adjudications of abuse under N.C. Gen. Stat. § 7B-101(1)(d), we decline to review the trial court's second theory of abuse. Mother suggests that this additional ground for the adjudication may affect the scope of the court's dispositional authority under N.C. Gen. Stat. § 7B-904 (2013). We are not persuaded. The facts that establish Eddie and Eve's status as abused under N.C. Gen. Stat. § 7B-101(1)(d) and the adjudication of neglect provide sufficient justification for the court to address Eddie and Eve's emotional health as part of its disposition.

VII. Conclusion

The trial court did not abuse its discretion in admitting Eve's out-of-court statements under the residual hearsay exception in Rule 803(24). The admission of Eddie's hearsay statements was not prejudicial to the adjudication of the juveniles as abused and, therefore, we decline to review whether this admission was in error. The evidence and the trial court's findings of fact supported its conclusions that Eddie and Eve were abused and neglected juveniles, and that Harriet was a neglected juvenile. Therefore, we affirm the trial court's adjudication order.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

JACKSON v. N.C. DEP'T OF COM. DIV. OF EMP'T SEC.

[242 N.C. App. 328 (2015)]

JACQUELINE M. JACKSON, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT
SECURITY, RESPONDENT, AND GOLDEN AGE OF LEXINGTON, INC., EMPLOYER

No. COA14-1247

Filed 21 July 2015

1. Appeal and Error—preservation of issues—issue not raised below

A discharged employee who brought an Employment Security Division proceeding failed to preserve any challenge to the consideration of a witness's written statement by not objecting to its introduction at the hearing before the appeals referee. Petitioner could have raised a hearsay argument for correction before the appeals referee, when all the evidence in this matter was collected, and not at the various levels of review.

2. Employer and Employee—unemployment benefits—misconduct

A discharged nursing assistant was disqualified from receiving unemployment benefits where she was discharged for work-related "misconduct"—namely, that she failed to report to a supervising nurse when a resident under her care fell and suffered a broken ankle. Statements and testimony supported the findings by the Board that were contested.

Appeal by Respondent and Employer from order entered 11 June 2014 by Judge Beecher R. Gray in Davidson County Superior Court. Heard in the Court of Appeals 7 April 2015.

Legal Aid of North Carolina, Inc., by Alicia C. Edwards, Janet McAuley Blue, John R. Keller, and Celia Pistolis, for Petitioner-appellee.

Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr. and Amanda R. Pickens, for Employer-appellant.

North Carolina Department of Commerce, Division of Employment Security, Legal Services Section, by Thomas H. Hodges, Jr. and Sheena J. Cobrand for Respondent-appellant.

JACKSON v. N.C. DEP'T OF COM. DIV. OF EMP'T SEC.

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DILLON, Judge.

Jacqueline M. Jackson ("Petitioner") was discharged from her employment with Golden Age of Lexington, Inc. ("Employer"). The Board of Review at the North Carolina Department of Commerce, Division of Employment Security ("Division") determined that Petitioner was disqualified to receive unemployment benefits. On appeal, the superior court reversed the Board of Review's decision and held that Petitioner was not disqualified to receive unemployment benefits. Employer and the Division (hereafter "Appellants") appeal the superior court's order. For the following reasons, we reverse the superior court's order.

I. Background

Employer operates a nursing facility. Petitioner worked for Employer as a certified nursing assistant. In August 2013, Employer terminated Petitioner's employment because she failed to report to Employer a "patient fall" which had occurred the prior week.

Petitioner filed for unemployment benefits. An adjudicator inside the Division ruled that Petitioner was not qualified to receive unemployment benefits because she had been "discharged for misconduct connected with the work." Petitioner appealed this decision to an appeals referee within the Division.

Following a hearing in which evidence was taken, the appeals referee entered a decision agreeing with the adjudicator's determination that Petitioner was not eligible to receive benefits. Petitioner appealed to the Division's Board of Review. The Board of Review affirmed the appeals referee's decision that Petitioner was disqualified for unemployment benefits. Petitioner filed a petition in superior court for judicial review of the Board of Review's decision.

Following a hearing on the matter, the superior court *reversed* the Board of Review's decision and held that Petitioner was entitled to benefits. Specifically, the superior court held that there was no *competent* evidence at the initial hearing before the adjudicator that a patient had, in fact, fallen during Petitioner's watch. Appellants filed notice of appeal from the superior court's order.

II. Analysis

Employer contends that Petitioner is ineligible for unemployment benefits because she was discharged for cause. Employer contends that Petitioner was discharged for failing to report that a patient had fallen

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out of her wheelchair as required by Employer's policies. (A nurse or other attendant is required to report any patient fall so that the patient can be evaluated by a doctor.)

Petitioner claims that she was not required to file a report because the patient in question did not fall from her wheelchair but had merely slumped in the wheelchair, as she testified before the adjudicator. Petitioner contends – and the superior court agreed – that Employer failed to produce any *competent* evidence before the appeals referee that the patient had, in fact, fallen. Rather, Petitioner contends that the only evidence before the appeals referee that a fall had occurred was offered in the form of incompetent hearsay. Specifically, Employer offered the written statement of another nurse, Ms. Hyatt, that the patient was on the floor when Petitioner called her into the patient's room to assist her.

A. Waiver of objection

[1] Appellants argue, *inter alia*, that Petitioner failed to preserve any challenge to the consideration by the fact finder of Ms. Hyatt's written statement by failing to object to its introduction at the hearing before the appeals referee. We agree.

Our Supreme Court has stated that hearsay evidence *which is not properly objected to* “is entitled to be considered for whatever probative value it may have.” *Quick v. United Ben. Life Ins.*, 287 N.C. 47, 59, 213 S.E.2d 563, 570 (1975). *See also Skipper v. Yow*, 249 N.C. 49, 56, 105 S.E.2d 205, 210 (1958); *State v. Bryant*, 235 N.C. 420, 423, 70 S.E.2d 186, 188 (1952); *In re Dunston*, 12 N.C. App. 33, 34, 182 S.E.2d 9, 9 (1971). And a factual determination by a fact finder can be sustained even where the only evidence offered to prove the fact is hearsay which was not objected to. *See Quick, supra; Skipper, supra.*

In matters appealed to the superior court from the Division, the findings of fact made by the Division “shall be conclusive and binding [on the superior court where] . . . supported by competent evidence.” N.C. Gen. Stat. § 96-4(q) (2013).¹

Here, Ms. Hyatt's testimony is relevant in this case because it tends to show that the patient under Petitioner's care did, in fact, fall from

1. We note that Employment Security Commission Regulations state that in hearings before an appeals referee, “the rules of evidence do not apply,” however, the appeals referee shall consider factors such as “the right of the party against whom the evidence is offered to confront the witness against [her].” ESC Regulation No. 14.18(I). As to these rules, we further note that pursuant to 2011 N.C. Sess. Laws 401, effective 1 November 2011, the Employment Security Commission of North Carolina became the Division of Employment Security within the North Carolina Department of Commerce.

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her wheelchair. At the hearing before the appeals referee, Employer introduced the substance of Ms. Hyatt's testimony through her written statement rather than by calling her as a witness. The appeals referee gave Petitioner's attorney opportunities throughout the course of the hearing to object to the introduction of Ms. Hyatt's written statement, and Petitioner could have done so on the basis that she should be afforded the opportunity to confront the witness. She was expressly asked by the referee whether there was any objection to Ms. Hyatt's statement being allowed into evidence, to which she responded, "No." Ms. Hyatt's statement was made part of the evidentiary record as an exhibit, "for whatever evidentiary value they may hold[.]" over no objection from Petitioner. Also, when the referee questioned Petitioner based on Ms. Hyatt's statements, Petitioner raised no objection. Accordingly, we hold that the appeals referee properly considered Ms. Hyatt's testimony offered in the form of her written statement. See *Natz v. Emp't Sec. Comm'n*, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477 (holding that "[a] litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible"), *affirmed* by 290 N.C. 473, 226 S.E.2d 340 (1976).

Petitioner argues that she did object to Ms. Hyatt's statement by raising hearsay arguments on appeal from the appeals referee's decision to the Board of Review² and on appeal before the superior court. Here, the Board of Review and superior court were acting as reviewing courts. N.C. Gen. Stat. § 96-15(e) permits the Board of Review to "affirm, modify, or set aside any decision of an appeals referee" and to "make a decision on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence[.]" In *Nantz*, the petitioner failed to object during the evidentiary phase of the matter and therefore waived appellate review. 28 N.C. App. at 630, 222 S.E.2d at 477. Likewise,

2. Petitioner's brief from before the Board of Review was not initially included in the record on appeal filed in this Court. However, Appellant's brief stated (1) that Petitioner did not object at the administrative hearing or at any point prior to her judicial appeal and (2) that it was too late for her to raise her hearsay arguments upon appeal to the superior court. On 20 January 2015, Petitioner filed a N.C. R. App. P. 9(b)(5) supplement to the printed record on appeal to include her brief filed with the Board of Review. On 18 February 2015, Appellants moved to strike Petitioner's Rule 9(b)(5) supplement to the printed record, arguing that it was not filed with or before the Superior Court when it made its decision and pursuant to Rule 9(a)(2)(d) & (e) and Rule 9(b)(5) cannot be included in the record on appeal to this Court. However, as it was supplemented to the record in direct response to Appellants' waiver argument, we consider Appellee's brief before the Board of Review, pursuant to N.C. R. App. P. 2 and deny Appellant's motion to strike.

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here, the only evidence was taken before the appeals referee. The Board of Review decided the issue based on the evidentiary record before it without taking "additional evidence" and the superior court "heard the argument of the parties, examined the Record on Appeal and review the evidence therein contained." Therefore, the only time at which Petitioner could have raised a hearsay argument, so that the error could be corrected, was before the appeals referee when all the evidence in this matter was collected.

Petitioner further argues that she preserved her hearsay argument at the hearing before the referee because she argued that Employer had not met his burden and the only competent evidence before the referee was Petitioner's testimony. However, Petitioner never objected specifically to the introduction of Ms. Hyatt's statement when it was being introduced, and, therefore, Ms. Hyatt's statement became competent evidence upon which the appeals referee could base a decision.

Petitioner also argues that her objection was preserved because objections based on questions presented by the appeals referee are automatically preserved pursuant to N.C. Gen. Stat. § 1A-1, Rule 46(a)(3).³ We note that Rule 46 could be applicable to the appeals referee's questioning of Petitioner regarding the content in Ms. Hyatt's statements. However, Rule 46 does not preserve any objection to the introduction of the statement itself.

B. Termination for misconduct

[2] "In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006). "A determination that an employee has engaged in misconduct under [N.C. Gen. Stat. § 96-14.6] is a conclusion of law." *Bailey v. Div. of Empl. Sec.*, ___ N.C. App. ___, ___, 753 S.E.2d 219, 221 (2014).

A claimant is presumed to be entitled to unemployment benefits, but this is a rebuttable presumption, with the burden on the employer to show circumstances which would disqualify the claimant. *Intercraft Indus. Corp v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982). An individual can be disqualified for employment benefits if they are determined to be terminated from employment for "misconduct connected

3. Rule 46(a)(3) states that "[n]o objections are necessary with respect to questions propounded to a witness by the court or a juror but it shall be deemed that each such question has been properly objected to and that the objection has been overruled and that an exception has been taken to the ruling of the court by all parties to the action." N.C. Gen. Stat. § 1A-1, Rule 46(a)(3) (2013).

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with the work.” N.C. Gen. Stat. § 96-14.6(a)(2013). “Misconduct” is defined as follows:

(1) Conduct evincing a willful or wanton disregard of the employer’s interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.

(2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer.

N.C. Gen. Stat. § 96-14.6(b).⁴ The employer has the burden of showing the employee’s disqualification from unemployment benefits on the basis of misconduct. *Lynch v. PPG Indus.*, 105 N.C. App. 223, 225, 412 S.E.2d 163, 165 (1992).

The Board of Review determined that Petitioner was disqualified from receiving unemployment benefits because she was discharged from employment as a nursing assistant for work-related “misconduct,” namely that she failed to report to a supervising nurse when a resident under her care fell and suffered a broken ankle. The trial court stated that only hearsay evidence supported the Board of Review’s findings of fact concerning the fall and that, without these findings, the Board of Review’s conclusion denying Petitioner unemployment benefits could not be sustained:

3. Claimant was discharged from this job for failing to report a fall by a resident.

....

7. At approximately 7 p.m., [the resident] had bruising and swelling on her right ankle and foot. The employer thought the resident had merely bumped her foot on something. However, as the employer began to ask questions of staff, she learned the resident had fallen while in the care of the claimant. Tabitha Hyatt, another certified nursing assistant had assisted the claimant with placing the resident back into her wheelchair. Ms. Hyatt wrote

4. What constituted “misconduct” was previously defined in N.C. Gen. Stat. § 96-14. However, this statute was repealed by Session Laws 2013-2, s.2(a), effective 1 July 2013, and replaced by N.C. Gen. Stat. § 96-14.1 *et seq.*

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a statement for the employer which stated in pertinent part: that as she was walking up the hall, the claimant approached her and asked her for her help. Ms. Hyatt and the claimant walked to room 200. The resident was in the bathroom and the claimant asked Ms. Hyatt to help her get the resident up. The resident was on the floor when Ms. Hyatt entered the room. A copy of Ms. Hyatt's statement in its entirety is a part of the record and marked Commission exhibit 3H.

. . . .

10. The resident's slip, even by claimant's explanation that she required assistant to put the resident back in her chair required reporting to the employer. The claimant was concerned about injury to the resident because she asked the resident if she was ok and noted that the resident did not complain of pain.

Ms. Hyatt's statement says that she observed the resident on the floor. Ms. Dunaway testified for Employer that the resident was in Petitioner's care at the time of the incident and Petitioner never reported the fall to Employer. The unchallenged findings further state that it was Employer's policy that required all residents "to be assessed by a nurse prior to being picked up from the floor after a fall[;]" that "an employee may be discharged immediately when his presence or conduct constitutes a significant problem or when his conduct is detrimental to the . . . residents[;]" and that "any . . . physical abuse to residents . . . will result in dismissal on the first offense[.]" Petitioner waived any hearsay objections to Ms. Hyatt's statement and Ms. Holloway's statement, along with corroborating testimony from Ms. Holloway, support the contested Board of Review's findings. We hold that these findings support the Board of Review's determination that Employer met its burden to show that Petitioner was discharged from her employment for "misconduct" and was properly denied benefits pursuant to N.C. Gen. Stat. § 96-14.6.

III. Conclusion

For the foregoing reasons, we reverse the trial court's order overruling the Board of Review's determination that Petitioner was discharged from her employment for misconduct related to her employment and thereby disqualified for unemployment benefits.

REVERSED.

Judges ELMORE and GEER concur.

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STATE OF NORTH CAROLINA

v.

DAVID MATTHEW LOWE

No. COA14-1360

Filed 21 July 2015

1. Search and Seizure—residence—warrant—probable cause—marijuana residue found in bag in garbage—anonymous tip

The trial court did not err by concluding the warrant authorizing the search of a residence was supported by probable cause. Based on the totality of circumstances, the presence of marijuana residue found in a bag pulled from Turner's garbage, the anonymous tip that Turner was "selling, using and storing" narcotics in his home, and Turner's history of drug-related arrests, in conjunction, formed a substantial basis to conclude that probable cause existed to search his home for the presence of contraband or other evidence.

2. Search and Seizure—motion to suppress evidence—probable cause—search of vehicle exceeded scope of warrant

The trial court erred in a drugs case by denying defendant's motions to suppress evidence. Although a warrant was supported by probable cause, the search of a visitor's vehicle in the driveway exceeded the scope of the warrant for the residence. The underlying judgments were vacated and remanded for further proceedings.

Appeal by defendant from judgments entered 8 July 2014 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 5 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Daphne Edwards for defendant-appellant.

INMAN, Judge.

This appeal concerns the validity of a search warrant for a home and the scope of that warrant, as related to a vehicle in the driveway not owned or controlled by the resident of the home.

David Matthew Lowe ("defendant") appeals from judgments entered after he pled guilty to one count each of trafficking in

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methylenedioxymethamphetamine (“MDMA”) by possession, trafficking in MDMA by transportation, and possession with intent to sell and deliver lysergic acid diethylamide (“LSD”). On appeal, defendant argues that the trial court erred by denying his motions to suppress because: (1) the search warrant issued for the residence where the vehicle containing defendant’s belongings was parked lacked probable cause; and (2) even if the search warrant were validly issued, the search of the vehicle exceeded the scope of the warrant.

Although we conclude that the warrant was supported by probable cause, we agree with defendant that the search of the vehicle exceeded the scope of that warrant. Therefore, we reverse the trial court’s denial of defendant’s motion to suppress, vacate the underlying judgments, and remand for further proceedings.

Background

On 24 September 2013, Detective K.J. Barber (“Det. Barber”) of the Raleigh Police Department filed an affidavit in support of a search warrant with the local magistrate. In the affidavit, Det. Barber swore to the following facts:

In September of 2013, I received information that a subject that goes by the name “Mike T” was selling, using and storing narcotics at 529 Ashbrooke [sic] Dr. Through investigative means, I was able to identify Terrence Michael Turner as a possible suspect.

Terrence Michael [T]urner, AKA: Michael Cooper Turner has been charged with PWISD Methylenedioxymethamphetamine, Possess Dimethyltryptamine, PWISD Psylocybin, PWISD Cocaine, Possess Heroin, PWIMSD Schedule I, Maintain a Vehicle/Dwelling, Trafficking in MDMA, Conspire to sell Schedule I and other drug violations dating back to 2001.

On 9/24/2013 I conducted a refuse investigation at 529 Ashebrook Dr. St [sic] Raleigh, NC 27609. The 96 gallon City of Raleigh refuse container was at the curb line in front of 529 Ashebrook Dr.

Detective Ladd removed one bag of refuse from the 96 gallon container and we took it to a secured location for further inspection. Inside the bag of refuse, I located correspondence to Michael Turner of 529 Ashebrook Dr. Raleigh, NC 27600, also in this bag of refuse, I located

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a small amount of marijuana residue in a fast food bag, which tested positive as marijuana utilizing a Sirche #8 field test kit.

Based on these facts and his experience and training as a narcotics officer, Det. Barber averred to his belief that illegal narcotics, including marijuana, were being stored in and/or sold from Turner's residence. Det. Barber's affidavit described the residence to be searched as 529 Ashebrook Drive, but did not specify any vehicles to search. The magistrate issued a warrant to search 529 Ashebrook Drive.

On 25 September 2013, Det. Barber and other officers executed a search of the residence. Inside the home the officers encountered Turner and two overnight guests—defendant and defendant's girlfriend, Margaret Doctors ("Ms. Doctors"). Parked in the driveway of Turner's home was a Volkswagen rental car, which the officers learned was being leased by Ms. Doctors and operated by both defendant and Ms. Doctors. The officers were aware at that time that Turner had no connection to the vehicle, other than it being parked in his driveway. A search of the Volkswagen revealed a book bag containing documents with defendant's name and controlled substances.¹

Defendant was indicted on 2 December 2013. Prior to trial, he moved to suppress all evidence against him on two grounds: (1) the warrant authorizing the search of Turner's residence was not supported by probable cause, and (2) even if the search warrant were validly issued, the search of the Volkswagen exceeded the scope of the warrant. The trial court conducted an evidentiary hearing on these motions on 7 and 8 July 2014. At the hearing, Det. Barber testified that he surveilled Turner's residence multiple times before applying for the search warrant, but never saw the Volkswagen until the day of the search. He also testified that he had never seen defendant at Turner's residence prior to the day of the search. Det. Barber said that it was normal protocol for police to search vehicles located on the premises of a residence for which they had a search warrant.

The trial court denied defendant's motions to suppress. It first concluded that the tip given to Det. Barber, corroborated by the presence of marijuana residue found in Turner's trash, was sufficient to establish probable cause to search his residence for the presence of narcotics. Second, the trial court concluded that the search of the Volkswagen did

1. As will be discussed in more detail below, the precise nature of the contraband found in the vehicle is unclear from the record.

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not exceed the scope of the warrant because the vehicle was parked within the curtilage of the home, which was specifically identified by address and physical description in the warrant.

After the trial court denied his motions to suppress, defendant pled guilty to all charges. He was sentenced to 35 to 51 months imprisonment for each count of trafficking in MDMA, which were to run concurrently, as well as 7 to 18 months imprisonment on the charge of possession with intent to sell and deliver LSD, set to run consecutive to the previous sentence. Defendant filed timely notice of appeal from these judgments.

I. Probable Cause

[1] Defendant first argues that the warrant authorizing the search of Turner's residence was not supported by probable cause, and therefore any evidence gained from that search should have been suppressed.² We disagree.

"Our scope of review of an order denying a motion to suppress evidence is 'whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Johnson*, 98 N.C. App. 290, 294, 390 S.E.2d 707, 709-10 (1990) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review the trial court's conclusions of law *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007).

Although we review the trial court's conclusions of law *de novo*, we must be cognizant of the notion that "great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should *not* take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (emphasis added). In addressing whether a search warrant is supported by probable cause, we apply a "totality of the circumstances" test, *State v. Beam*, 325 N.C. 217, 220-21, 381 S.E.2d 327, 329 (1989), by which an affidavit is sufficient if it establishes "reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256. "Probable cause does not mean actual and positive cause nor import absolute certainty," *id.*, and as such, "the duty of a reviewing

2. The State does not contest on appeal whether defendant has standing to challenge the officers' search of Turner's home.

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court is simply to ensure that the magistrate had a ‘substantial basis’ to conclude that probable cause existed,” *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983)).

A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner. [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Riggs, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (alterations in original) (citations and quotation marks omitted). However, the magistrate may not act merely as a “rubber stamp for the police.” *State v. Bullar*, 267 N.C. 599, 601, 148 S.E.2d 565, 567 (1966).

Defendant cites *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014), in support of his argument that the search warrant here was issued without probable cause. In *Benters*, our Supreme Court held that where an unidentified informant’s tip that the defendant was growing marijuana “amounts to little more than a conclusory rumor,” the State is not “entitled to any great reliance on it,” and instead, “the officers’ corroborative investigation must carry more of the State’s burden to demonstrate probable cause.” *Id.* at 669, 766 S.E.2d at 600. The State in *Benters* argued that officers presented corroborative evidence including: (1) utility records indicating power consumption consistent with a marijuana growing operation in a residence owned by the defendant; (2) the existence in plain view of gardening equipment such as potting soil, fertilizer, seed trays, and pump type sprayers in the absence of any gardens or potted plants on the outside of the home; and (3) the officers’ expertise and knowledge of the defendant. *Id.* at 669, 766 S.E.2d at 601. After examining these contentions under a “totality of the circumstances” test, the Court held that:

[T]he officers’ verification of mundane information, . . . statements regarding [the] defendant’s utility records, and the officers’ observations of [the] defendant’s gardening supplies are not sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause, notwithstanding the officers’ professional training and experience. Furthermore, the material allegations

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set forth in the affidavit are uniformly conclusory and fail to provide a substantial basis from which the magistrate could determine that probable cause existed.

Id. at 673, 766 S.E.2d at 603. Specifically with regard to the gardening equipment, the Court noted that “[n]othing here indicates a fair probability that contraband or evidence of a crime will be found in a particular place beyond [the officer’s] wholly conclusory allegations.” *Id.* at 672, 766 S.E.2d at 602 (quotation marks omitted).

The facts before us differ significantly from those in *Benters*. Here, Det. Barber conducted a refuse search of defendant’s trash, the legality of which is not contested. In one of the bags, Det. Barber found correspondence to Turner at the address in question and a small amount of marijuana residue in a fast food bag.

Defendant concedes in his brief on appeal that “residue of marijuana might be indicative of drug use,” but he argues that this evidence did not sufficiently corroborate the anonymous tip that Turner was selling drugs. This distinction is irrelevant. It is well-established in North Carolina that “a residue quantity of a controlled substance, despite its not being weighed, is sufficient to convict a defendant of possession of the controlled substance[.]” *State v. Williams*, 149 N.C. App. 795, 798-99, 561 S.E.2d 925, 927 (2002); *see also State v. Thomas*, 20 N.C. App. 255, 257, 201 S.E.2d 201, 202 (1973). Possession of controlled substances in violation of N.C. Gen. Stat. § 90-95 (2013) was identified by Det. Barber in the affidavit supporting the warrant as the specific crime for which he sought further evidence in the search of Turner’s home. The affidavit also makes clear that Det. Barber received information that Turner was “selling, using and storing narcotics” at his residence.

Therefore, unlike in *Benters*, the magistrate here was presented with direct evidence of the crime for which the officers sought to collect evidence. Although there were many reasons the gardening equipment may have been outside the defendant’s house in *Benters*, the presence of marijuana residue in defendant’s trash offers far fewer innocent explanations. As our Supreme Court noted in *Sinapi*, when faced with evidence collected from a refuse search, a magistrate may “rely on his personal experience and knowledge related to residential refuse collection to make a practical, threshold determination of probable cause,” and he is “entitled to infer that the garbage bag in question came from [the] defendant’s residence and that items found inside that bag were probably also associated with that residence.” *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (holding that a search warrant was supported by probable

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cause where the defendant had been arrested twice for drug-related offenses and eight marijuana plants were recovered from a garbage bag outside the defendant's home). Although the amount of marijuana in this case differs substantially from that in *Sinapi*, the reasoning establishing probable cause is the same. While the classification of crimes as misdemeanors or felonies may differ based on the quantity of contraband, the threshold determination of whether behavior is criminal or not is binary; possession of eight marijuana plants is equally as unlawful as possession of marijuana residue. See *Williams*, 149 N.C. App. at 798-99, 561 S.E.2d at 927. Defendant offers no legal support for the argument that search warrants must be supported by probable cause of a certain type or severity of crime as opposed to criminal behavior in general.

Similarly to our Supreme Court in *Sinapi*, many courts in other jurisdictions have recognized that "the recovery of drugs or drug paraphernalia from the garbage contributes significantly to establishing probable cause." *U.S. v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003) (holding that marijuana seeds and stems found in the defendant's garbage were sufficient standing alone to establish probable cause because "simple possession of marijuana seeds is itself a crime under both federal and state law"); see also *U.S. v. Colonna*, 360 F.3d 1169, 1175 (10th Cir. 2004) (holding that evidence of drugs in the defendant's trash cover, while potentially indicating only personal use, was sufficient to establish probable cause because "all that is required for a valid search warrant is a fair probability that contraband or evidence of a crime will be found in a particular place") (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 543 (1983)).

Accordingly, based on the totality of the circumstances, we hold that the presence of marijuana residue found in a bag pulled from Turner's garbage, the anonymous tip that Turner was "selling, using and storing" narcotics in his home, and Turner's history of drug-related arrests, in conjunction, formed a substantial basis to conclude that probable cause existed to search his home for the presence of contraband or other evidence. See *Sinapi*, 359 N.C. at 398, 610 S.E.2d at 365; *Beam*, 325 N.C. at 221, 381 S.E.2d at 329. Therefore, we affirm the trial court's denial of defendant's motions to suppress on this ground.

II. Search of the Vehicle

[2] Defendant next argues that the search of the Volkswagen in Turner's driveway exceeded the scope of the warrant issued to search Turner's residence. After careful consideration, we agree.

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There is long-standing precedent in North Carolina and other jurisdictions that, “[a]s a general rule, ‘if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car.’” *State v. Courtright*, 60 N.C. App. 247, 249, 298 S.E.2d 740, 742 (1983) (emphasis added) (quoting *State v. Reid*, 286 N.C. 323, 326, 210 S.E.2d 422, 424 (1974)); see also *State v. Logan*, 27 N.C. App. 150, 151, 218 S.E.2d 213, 214-15 (1975). Because “[a]uthority to search a house gives officers the right to search cabinets, bureau drawers, trunks, and suitcases therein, though they were not described,” *Reid*, 286 N.C. at 326, 210 S.E.2d at 424, it follows that the search of other personal property belonging to the defendant—such as a vehicle—would also be authorized, assuming that the property was within the curtilage of the home. See, e.g., *Courtright*, 60 N.C. App. at 250-51, 298 S.E.2d at 742-43 (holding that the search of the defendant’s vehicle parked six or seven inches into the yard of the defendant’s residence was lawful even though the vehicle was not identified in the search warrant because it was within the curtilage of the premises, which the Court noted is an area “within which the owner or possessor assumes the responsibilities and pleasures of ownership or possession”).

Here, it is undisputed that the Volkswagen parked in Turner’s driveway was within the curtilage of the residence that the officers were authorized to search pursuant to the warrant. Therefore, the State argues that the holdings of *Courtright*, *Reid*, and *Logan* require us to affirm the trial court’s denial of defendant’s motion to suppress. We are unpersuaded.

The crucial fact distinguishing this case from *Courtright*, *Reid*, and *Logan* relates to law enforcement officers’ knowledge about the ownership and control of the vehicle. In each of the cases relied on by the State, the individual associated with the premises identified in the search warrant unquestionably owned and operated the vehicle that was searched at that location. See *Courtright*, 60 N.C. App. at 249, 298 S.E.2d at 741 (1983) (noting that the officers had observed the vehicle at the defendant’s home and knew it was registered in the defendant’s name before searching it); *Reid*, 286 N.C. at 326-27, 210 S.E.2d at 424 (emphasizing “the wisdom of the cases which hold a search warrant for contraband on specifically described premises, contemplates the search of any automobile *belonging to the owner* and parked thereon”) (emphasis added); *Logan*, 27 N.C. App. at 151, 218 S.E.2d at 214 (characterizing the vehicle searched at the defendant’s premises as the “defendant’s automobile”).

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Here, the target of the search was Turner. However, officers knew prior to searching the Volkswagen in the driveway that it did not belong to Turner. At the evidentiary hearing on defendant's motions to suppress, Det. Barber testified that prior to the search, he had never seen the Volkswagen at Turner's residence. He further testified that after the officers went into Turner's home, they established that the vehicle was being rented by Ms. Doctors, operated by defendant and Ms. Doctors, and that Turner had neither dominion nor control over the vehicle.

These facts distinguish this case from *Courtright*, *Reid*, and *Logan*. The reasoning justifying the holdings of those opinions simply does not apply here. We note that our appellate courts have yet to determine the precise issue raised in this case—whether the search of a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant. However, we find guidance in the holdings from this Court addressing the constitutionality of searches of persons at the premises identified in a validly executed search warrant and from other jurisdictions addressing the dispositive issue before us.

The seminal case on the constitutionality of searching visitors at a location identified in a valid warrant is *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238 (1979). In *Ybarra*, police officers obtained a warrant supported by probable cause to search a tavern at which the defendant was a patron. *Id.* at 88, 62 L. Ed. 2d at 243. The defendant was searched pursuant to that warrant, and the officers found drugs in his pocket. *Id.* at 89, 62 L. Ed. 2d at 243. The Court held:

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91, 62 L. Ed. 2d at 245 (citations omitted).

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Because “[t]he Fourth and Fourteenth Amendments protect ‘the legitimate expectations of privacy’ of persons, not places,” *id.*, we are not persuaded by the State’s argument that the search of the Volkswagen was permissible under the scope of the warrant solely because the vehicle was within the curtilage of the residence to be searched. The State’s proffered rule would allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search. We decline to stray so far from the reasoning of *Ybarra* and our cases applying that decision. *See, e.g., State v. Smith*, 222 N.C. App. 253, 729 S.E.2d 120 (2012); *State v. Cutshall*, 136 N.C. App. 756, 526 S.E.2d 187 (2000).

Instead, we find persuasive the reasoning of courts in other jurisdictions holding that a warrant authorizing the search of a house or business does not automatically cover the search of a vehicle owned, operated, or controlled by a stranger to the investigation. *See, e.g., State v. Barnett*, 788 S.W.2d 572, 575 (Tex. Crim. App. 1990) (citing *Ybarra* in support of its holding that “the presence of an automobile on suspected premises, without more, does not give rise to search that automobile”); *Dunn v. State*, 292 So.2d 435 (Fla. Dist. Ct. App. 1974) (holding that a search of the defendant’s van was unlawful even though it was parked in the driveway of the premises identified in a valid search warrant because the officers had no indication that the vehicle was connected in any way to the target of the search). We note that the United States Courts of Appeals are split with regard to whether the target of the investigation must actually own the vehicle in question, or whether objective indicia of control are sufficient to justify the search. *See, e.g., U.S. v. Pennington*, 287 F.3d 739, 745 (8th Cir. 2002) (noting that a warrant to search a residence includes vehicles within the curtilage “except, for example, the vehicle of a guest or other caller”); *U.S. v. Patterson*, 278 F.3d 315, 318-19 (4th Cir. 2002) (noting that the scope of a search warrant includes “automobiles on the property or premises that are owned by or are under the dominion and control of the premises owner or which reasonably appear to be so controlled”); *U.S. v. Evans*, 92 F.3d 540, 543-44 (7th Cir. 1996) (holding that “it does not matter whose [vehicle] it is unless it obviously belonged to someone wholly uninvolved in the criminal activities going on in the house”).

Based on the foregoing principles, we conclude that the search of the Volkswagen exceeded the scope of the warrant to search Turner’s residence for contraband. Therefore, the evidence found in the vehicle

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is subject to suppression. See *State v. Larkin*, __ N.C. App. __, __, 764 S.E.2d 681, 687 (2014).

Nevertheless, the State argues that the evidence gained from the search of the Volkswagen should not be excluded, because it falls under the “good faith exception” to the exclusionary rule. N.C. Gen. Stat. § 15A-974(a)(2) (2013) provides “[e]vidence shall not be suppressed . . . if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.” The State contends that because Det. Barber testified it was his department’s policy to search all vehicles within the curtilage of the premises for which they had a search warrant, regardless of the vehicle’s connection to the target of the search, the officers had an “objectively reasonable, good faith” belief that the search of the Volkswagen was permissible. We disagree.

The good faith exception to the exclusionary rule stems from the United States Supreme Court’s holding in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677 (1984). In declining to apply the exclusionary rule where the investigating officers acted in objectively reasonable reliance on a warrant issued by a magistrate which was later held to be invalid, the Court reasoned that “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” *Id.* at 921, 82 L. Ed. 2d at 697. As our Supreme Court has stated, “[t]he exclusionary rule was designed to deter police misconduct, not a judge’s errors.” *State v. Welch*, 316 N.C. 578, 588, 342 S.E.2d 789, 794 (1986).

Here, contrary to the State’s contention, the error in searching the Volkswagen lies solely with the officers conducting that search, not the magistrate who issued the warrant for Turner’s home. As evidenced by Det. Barber’s testimony that he had seen neither the Volkswagen nor defendant prior to the execution of the search, it is evident that the magistrate had no knowledge of them either. Therefore, because the misconduct in this case is attributable to the police (either in the form of their internal policies, as Det. Barber contended, or the isolated actions of the officers in this case), the good faith exception to the exclusory rule is inappropriate here.

In sum, we hold that the search of the vehicle exceeded the scope of the search warrant and violated defendant’s rights under the Fourth Amendment. Accordingly, we reverse the trial court’s denial of defendant’s motion to suppress evidence obtained from the vehicle.

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Finally, we note that the record raises the question of whether contraband attributable to defendant was found during the search of Turner's home, which we held above was valid.³ The inventory of items seized does not specify which items were found in the vehicle, which were found in the home, or where in the home items were found. Because we are unable to determine which, if any, of defendant's convictions appealed were based on evidence gained from the valid search of the home, we remand this matter to the trial court to determine what portion of the contraband was subject to suppression consistent with this decision and the resulting effect on each of the charges for which defendant was convicted. If the trial court is unable to make a determination as to what portion of the contraband was found in the house as opposed to the vehicle, then all underlying judgments must be vacated.

Conclusion

After careful review, we conclude that the warrant to search Turner's residence was valid and supported by probable cause. However, the search of the Volkswagen exceeded the scope of the warrant, and any evidence obtained thereby is subject to suppression.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judges BRYANT and DAVIS concur.

3. During the suppression hearing, counsel for defendant conceded that contraband was found in the room that defendant and his companion were occupying. Neither defendant nor the State addresses in their respective briefs this fact or how it might affect the analysis of the legal issues raised on appeal.

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[242 N.C. App. 347 (2015)]

STATE OF NORTH CAROLINA

v.

FELIX RICARDO SALDIERNA

No. COA14-1345

Filed 21 July 2015

1. Juveniles—interrogation—right to have parent present—ambiguous request

Where a 16-year-old juvenile asked an interrogating officer, “Can I call my mom?” the trial court’s findings that the juvenile’s request was at best ambiguous and that he never made an unambiguous request to have his mother present were supported by competent evidence.

2. Juveniles—interrogation—right to have parent present—ambiguous request—clarification required

The trial court erred in concluding that the officer complied with the provisions of N.C.G.S. § 7B-2101 in questioning a juvenile where a 16-year-old juvenile asked an interrogating officer, “Can I call my mom?” His request to call his mother was ambiguous, and the officer was required to clarify whether he was invoking his right to have a parent present during the interview.

Appeal by Defendant from order entered 20 February 2014 by Judge Forrest D. Bridges and judgment entered 4 June 2014 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 June 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer St. Clair Watson, for the State.

Goodman Carr, PLLC, by W. Rob Heroy, for Defendant.

STEPHENS, Judge.

In this appeal, we consider a matter of first impression: Whether an ambiguous statement made by a juvenile which implicates his statutory right to have a parent present during a custodial interrogation requires that the law enforcement officer conducting the interview clarify the meaning of the juvenile’s statement before continuing her questioning. For the reasons discussed herein, we conclude that it does.

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Factual and Procedural Background

This appeal arises from Defendant Felix Ricardo Saldierna's attempt to suppress a confession he gave to police officers while in custody. On 17 and 18 December 2012, several homes in Charlotte were broken into, burglarized, and vandalized. Saldierna was arrested at his home in Fort Mill, South Carolina on 9 January 2013 in connection with those crimes. Saldierna, who was then 16 years old, was transported to Moss Justice Center in York County, South Carolina, where he was questioned by Detective Aimee¹ Kelly of the Charlotte-Mecklenburg Police Department ("CMPD"). Kelly conducted an interview with Saldierna in the booking area of the justice center. Audio of the entire interview was recorded ("the recording"). The recording reveals the following: Saldierna stated that he was bi-lingual, but read Spanish better than English. At the start of the interview, Saldierna told Kelly that his English was "good," but that he might ask her to explain some things more slowly. However, after this remark, Saldierna never clearly indicated that he did not understand Kelly's questions or statements.

Before asking Saldierna any questions about the crimes, Kelly read him his rights and asked him whether he understood them. During the interview, Kelly gave Saldierna written Juvenile Waiver of Rights forms in both English and Spanish. Kelly read each part of the English language form to Saldierna as he followed along on the forms in both languages. After reading each paragraph, Kelly asked Saldierna if he understood the right discussed in that paragraph and had him initial the copy of the form in English to indicate that he did. Kelly also asked Saldierna to confirm verbally that he understood each right as she read them to him. Saldierna answered "yeah" or "yes ma'am" to all but one of Kelly's inquiries. Due to the poor quality of the audio recording, Saldierna's response to Kelly's informing him of his right to have an attorney present during the interview is unintelligible, but he responded "yes ma'am" to Kelly's next statement and question, "If I want to have a lawyer with me during questioning one will be provided to me at no cost before any questioning. Do you understand that?"

Saldierna initialed each statement of rights on the form and the option "I DO wish to answer questions now WITHOUT a lawyer, parent, guardian, or custodian here with me" and signed the form. The transcript of the recording reveals the following exchange then occurred:

1. Kelly's first name is spelled "Aimee" in the hearing transcript, but the briefs of both parties and some other documents in the record on appeal spell her name "Amy."

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K[elly]: It is 1/9/13. It is 12:10PM.
[unintelligible background
talking among officers]

[Saldierna]: Um, Can I call my mom?

K[elly]: Call your mom now?

[Saldierna]: She's on her um. I think she
is on her lunch now.

K[elly]: You want to call her now
before we talk?

K[elly] [to other officers]: He wants to call his mom.

[Saldierna]: Cause she's on, I think she's
on her lunch.

[Other officer]: [unintelligible] He left her a
message on her phone.

[Saldierna]: But she doesn't speak
English.

[conversation among officers]

K[elly]: I have mine. Can he dial it
from a landline you think?

[more unintelligible conversation among officers]

[Other officer]: [S]tep back outside and
we'll let you call your mom
outside. [unintelligible].
You're going to have to talk
to her. Neither one of us
speak Spanish, ok.

[more unintelligible conversation among officers]

[Saldierna can be heard on phone. Call is not intelligible.]

[Sound of door closing].

K[elly]: 12:20: Alright Felix, so, let's
talk about this thing going
on. . . .

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At this point, Kelly continued her interview with Saldierna, and, over the course of the next hour, he confessed his involvement in the incidents in Charlotte the previous December.

On 22 January 2013, Saldierna was indicted on two counts of felony breaking and entering and one count each of conspiracy to commit breaking and entering and conspiracy to commit common law larceny after breaking and entering.² On 9 October 2013, Saldierna moved to suppress his confession. The trial court, the Honorable Forrest D. Bridges, Judge presiding, heard the motion on 31 January 2014, and, at the conclusion of the hearing, orally denied Saldierna's motion. The court entered a written order memorializing that ruling on 20 February 2014 that contained the following findings of fact:

1. That Defendant was in custody.
2. That Defendant was advised of his juvenile rights pursuant to North Carolina General Statute § 7B-2101.
3. That Detective Kelly of the Charlotte-Mecklenburg Police Department advised Defendant of his juvenile rights.
4. That Defendant was advised of his juvenile rights in three manners. Defendant was advised of his juvenile rights in spoken English, in written English, and in written Spanish.
5. That Defendant indicated that he understood his juvenile rights as given to him by Detective Kelly.
6. That Defendant indicated he understood his rights after being given and reviewing a form enumerating those rights in Spanish.
7. That Defendant indicated he understood that he had the right to remain silent. Defendant understood that to mean that he did not have to say anything or answer any questions. Defendant initialed next to this right at number 1 on the English rights form provided to him by Detective Kelly to signify his understanding.

2. Only these four indictments are included in the record on appeal. However, the transcript of plea lists five additional offenses, including breaking and entering, conspiracy, and larceny, which were dismissed by the State pursuant to the plea agreement. The file numbers of those offenses suggest that they arose from the events of December 2012.

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8. That Defendant indicated he understood that anything he said could be used against him. Defendant initialed next to this right at number 2 on the English rights form provided to him by Detective Kelly to signify his understanding.

9. That Defendant indicated he understood that he had the right to have a parent, guardian, or custodian there with him during questioning. Defendant understood the word parent meant his mother, father, stepmother, or stepfather. Defendant understood the word guardian meant the person responsible for taking care of him. Defendant understood the word custodian meant the person in charge of him where he was living. Defendant initialed next to this right at number 3 on the English rights form provided to him by Detective Kelly to signify his understanding.

10. That Defendant indicated he understood that he had the right to have a lawyer and that he had the right to have a lawyer there with him at the time to advise and help him during questioning. Defendant initialed next to this right at number 4 on the English rights form provided to him by Detective Kelly to signify his understanding.

11. That Defendant indicated he understood that if he wanted a lawyer there with him during questioning, a lawyer would be provided to him at no cost prior to questioning. Defendant initialed next to this right at number 5 on the English rights form provided to him by Detective Kelly to signify his understanding.

12. That Defendant initialed a space below the enumerated rights on the English rights form that stated the following: "I am 14 years old or more and I understand my rights as explained by Detective Kelly. I DO wish to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below."

13. That Defendant's signature appears on the English rights form below the initialed portions of the form. Defendant's signature appears next to the date, 1-9-13, and

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the time, 12:10. Detective Kelly signed her name as a witness below Defendant's signature.

14. That after being informed of his rights, informing Detective Kelly he wished to waive those rights, and signing the rights form, Defendant communicated to Detective Kelly that he wished to contact his mother by phone. Defendant was given permission to do so.

15. That Defendant attempted to call his mother, but was unable to speak to her.

16. That Defendant indicated that his mother was on her lunch break at the time he tried to contact her.

17. That Defendant did not at that time or any other time indicate that he changed his mind regarding his desire to speak to Detective Kelly. That Defendant did not at that time or any other time indicate that he revoked his waiver.

18. That Defendant only asked to speak to his mother.

19. That Defendant did not make his interview conditional on having his mother present or conditional on speaking to his mother.

20. That Defendant did not ask to have his mother present at the interview site.

21. That, upon review of the totality of the circumstances, the [c]ourt finds that Defendant's request to speak to his mother was at best an ambiguous request to speak to his mother.

22. That at no time did Defendant make an unambiguous request to have his mother present during questioning.

23. That Defendant never indicated that his mother was on the way or could be present during questioning.

24. That Defendant made no request for a delay of questioning.

Based upon those findings, the trial court made the following conclusions of law:

1. That the State carried its burden by a preponderance of the evidence that Defendant knowingly, willingly, and understandingly waived his juvenile rights.

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2. That the interview process in this case was consistent with the interrogation procedures as set forth in North Carolina General Statute § 7B-2101.
3. That none of Defendant's State or Federal rights were violated during the interview conducted of Defendant.
4. That statements made by Defendant were not gathered as a result of any State or Federal rights violation.

On 4 June 2014, Saldierna came back before the trial court, the Honorable Jesse B. Caldwell, Judge presiding, and entered guilty pleas to two charges each of felony breaking and entering and conspiracy to commit breaking and entering, specifically reserving his right to appeal the denial of his motion to suppress. The court imposed a sentence of 6-17 months, suspended that sentence, and placed Saldierna on 36 months of supervised probation. Saldierna gave notice of appeal in open court.

Discussion

Saldierna argues that the trial court erred in denying his motion to suppress the confession he gave to Kelly. Specifically, Saldierna contends that: (1) his request to call his mother was an unambiguous invocation of his right to have a parent present during a custodial interrogation, and that, in the alternative, (2) if his request was ambiguous, due to Saldierna's status as a juvenile, Kelly was required to make further inquiries to clarify whether he actually meant that he was invoking his right to end the interrogation until his mother was present.

I. Standard of review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Likewise, "[t]o determine whether the interrogation has violated [the] defendant's rights, we review the findings and conclusions of the trial court." *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002).

Here, Saldierna fails to specify which findings of fact he challenges as unsupported by competent evidence, but he does assert that his request to call his mother "was not ambiguous[]" and that he directly

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sought to have a parent present [during the interview].” Accordingly, we consider whether competent evidence before the trial court supported findings of fact 18-22, which address that factual issue.

Saldierna alternatively contends that, if his request to call his mother was ambiguous, Kelly was required to clarify whether Saldierna was invoking his right to have a parent present during a custodial interrogation as guaranteed by section 7B-2101. Finally, Saldierna argues that the trial court did not appropriately consider his juvenile status in determining that his waiver of rights was knowing and voluntary. As with his arguments regarding the trial court’s findings of fact, Saldierna’s challenges to the trial court’s conclusions of law are not clearly identified and delineated. However, his arguments appear to implicate both conclusions of law 1 and 2, and thus, we further consider whether each is supported by the trial court’s findings of fact.

II. Findings of fact 18-22: clarity of request to have a parent present during interview

[1] Saldierna first contends that his question—“Can I call my mom?”—is similar to the unambiguous requests to have a parent present made by the juvenile defendants in *Branham* and *State v. Smith*, 317 N.C. 100, 343 S.E.2d 518 (1986), *overruled in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). We find both cases distinguishable and hold that the trial court’s findings of fact, specifically that Saldierna’s request to speak to his mother was “at best an ambiguous request” and that Saldierna never made an “unambiguous request to have his mother present during questioning[,]” are supported by competent evidence.

In *Branham*, “[a]fter being advised of his juvenile rights, [the] defendant indicated and had the officers write on the form that he wanted his mother present. Although she was in the building at the time of the interrogation, the officers did not bring her to [the] defendant, but told him he could continue with his statement anyway.” 153 N.C. App. at 93, 569 S.E.2d at 25. The defendant subsequently gave the officers a confession that was later admitted against him at trial. *Id.* This Court held that, “[b]ecause [the] defendant invoked his right to have a parent present during interrogation, all interrogation should have ceased. Since it did not, the trial court erred by denying [the] defendant’s motion to suppress his statement, which was elicited in violation of [section] 7B-2101.” *Id.* at 99, 569 S.E.2d at 29.

Similarly, in *Smith*, the “defendant, after being advised of his statutory right to have a parent present during police questioning, requested

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that his mother be brought to the station.” 317 N.C. at 107, 343 S.E.2d at 522. Despite a clear and undisputed request to wait until his mother arrived before the interrogation resumed, various police officers continued to provide the defendant information about what his co-defendant was claiming and to ask the defendant whether he wanted give his side of the story. *Id.* It was that ongoing engagement with the juvenile defendant following his clear request to have a parent present that resulted in a new trial for the defendant. *Id.* at 108, 343 S.E.2d at 522.

Here, in contrast, Saldierna made a request to call his mother, but made no unequivocal verbal request to have his mother present during questioning, as in *Smith*, nor did he make any written notation of that request on the waiver form he signed, as in *Branham*. A careful reading of Saldierna’s arguments to this Court shows an alternative contention that his ambiguous request to call his mother should be interpreted in the totality of the circumstances as an invocation of his right to have a parent present during the interview. While we decline Saldierna’s invitation to reach that interpretation, our discussion in Part III manifests our concern that this ambiguous statement calls into question the trial court’s conclusion of law that no violation of his rights occurred.

III. Conclusion of law 2: compliance with section 7B-2101

[2] Saldierna’s primary argument on appeal is that, if his request to call his mother was an ambiguous statement possibly implicating his right under section 7B-2101 to have a parent present during the custodial interrogation, Kelly was required to “clarify[his] desire to proceed without his mother” before she continued questioning him. We find Saldierna’s contentions on this point persuasive.

In recognition of the special status of persons under the age of eighteen, our State’s Juvenile Code provides specific interrogation procedures for juveniles:

Any juvenile in custody must be advised prior to questioning:

- (1) That the juvenile has a right to remain silent;
- (2) That any statement the juvenile does make can be and may be used against the juvenile;
- (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

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(4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101(a) (2013).³ Subsections (a)(1), (2), and (4) of this statute simply codify the so-called *Miranda* rights guaranteed to both adults and juveniles by the Fifth Amendment to the United States Constitution. See *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966) (holding that all persons subjected to custodial police interrogations must be advised of their rights to remain silent and to counsel and informed that any statements they make may be used against them in a later legal proceeding). However, subsection (a)(3) is *not* the codification of a federal constitutional right, but rather our General Assembly's grant to the juveniles of North Carolina of a purely statutory protection *in addition* to those identified in *Miranda*. See, e.g., *State v. Fincher*, 309 N.C. 1, 12, 305 S.E.2d 685, 692 (1983) ("The failure to advise [the juvenile] defendant of his right to have a parent, custodian or guardian present during questioning is not an error of constitutional magnitude because this privilege is statutory in origin and does not emanate from the Constitution."); see also *State v. Yancey*, 221 N.C. App. 397, 399, 727 S.E.2d 382, 385 (2012). This distinction is critical to our resolution of the issue raised by Saldierna.

As both Saldierna and the State note in their appellate arguments, precedent firmly establishes that invocation of one's *Miranda* rights must be clear and unequivocal. Thus, a "suspect must unambiguously request counsel. . . . Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994) (citations and internal quotation marks omitted). Accordingly, the Court explicitly "decline[d] to adopt a rule requiring officers to ask clarifying questions" when a suspect's statement regarding counsel is ambiguous. *Id.* at 461, 129 L. Ed. 2d at 373. Likewise, our Supreme Court has held that a juvenile defendant must make an unambiguous statement in order to invoke his right to remain silent. *State v. Golphin*, 352 N.C. 364, 451-52, 533 S.E.2d 168, 225 (2000) (citing, *inter alia*, *Davis*), *cert denied*,

3. The rights now guaranteed to juveniles pursuant to section 7B-2101 were originally codified in N.C. Gen. Stat. § 7A-595, which was repealed effective 1 July 1999 and then re-codified as part of our Juvenile Code. See 1998 N.C. Sess. Laws 202. Although the wording differed slightly in section 7A-595, the substance of its subsections (a)(1)-(4) are indistinguishable from that in subsections (a)(1)-(4) of section 7B-2101.

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532 U.S. 931, 149 L. Ed. 2d 305 (2001). In that case, the Court found no error in the admission of the juvenile defendant's inculpatory statement made after his equivocal comment that "he didn't want to say anything about the jeep [connected to a murder]." *Id.* In sum, with regard to a defendant's *Miranda* rights to remain silent and to have an attorney present during a custodial interrogation, the law is clear: Such rights must be unequivocally invoked and, where a defendant makes an ambiguous statement touching on those rights, law enforcement officials have no obligation to clarify the defendant's intent or desire. Further, under *Golphin*, this rule applies with equal force to juvenile defendants. *See id.*

However, this case law regarding invocation of the *Miranda* rights guaranteed by the federal Constitution and codified in subsections 7B-2101(a)(1), (2), and (4) does *not* control our analysis of a juvenile's ambiguous statement possibly invoking the purely statutory right granted by our State's General Assembly in section 7B-2101(a)(3). Further, while our appellate courts have addressed the effect of a juvenile's unambiguous invocation of his right to have a parent present during a custodial interrogation, *see, e.g., Smith*, 317 N.C. at 107, 343 S.E.2d at 522; *Branham*, 153 N.C. App. at 93, 569 S.E.2d at 25, we are aware of no case in this State which has considered the implications of a juvenile's *ambiguous* reference to that protection.

The State urges this Court to apply the same analysis and rule regarding ambiguity to a juvenile's right to have a parent present during questioning as we must apply to the *Miranda* rights codified in section 7B-2101(a). However, our review of the provisions of section 7B-2101 reveals an understanding by our General Assembly that the special right guaranteed by subsection (a)(3) is different from those rights discussed in *Miranda* and, in turn, reflects the legislature's intent that law enforcement officers proceed with great caution in determining whether a juvenile is attempting to invoke this right.⁴

First, and most obviously, the right to have a parent present during custodial interrogations is not a constitutional right provided to all suspects of whatever age. Instead, it is an *additional* protection specifically granted through our Juvenile Code to the children of our State, a right which goes beyond the protections offered to adult suspects during

4. We offer no opinion regarding Saldierna's assertion that a logical extension of the recent holding in *J.D.B. v. North Carolina*, __ U.S. __, 180 L. Ed. 2d 310 (2011), would require that law enforcement officers clarify ambiguous statements by juveniles which could implicate the *Miranda* rights included in section 7B-2101, and that, in turn *Golphin* must be overruled. That issue is not before us in the instant appeal.

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interrogations. *See, e.g.*, N.C. Gen. Stat. § 7B-2101; *Fincher*, 309 N.C. at 12, 305 S.E.2d at 692. That our legislature would choose to extend such a special protection to the children of this State is neither surprising nor unique to the circumstance of police interrogations. As the United States Supreme Court has recently observed,

[a] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults; and so on. Addressing the specific context of police interrogation, we have observed that events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. Describing no one child in particular, these observations restate what any parent knows — indeed, what any person knows — about children generally.

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court's own generalizations, the legal disqualifications placed on children as a class — *e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent — exhibit the settled understanding that the differentiating characteristics of youth are universal.

J.D.B., __ U.S. at __, 180 L. Ed. 2d at 323-24 (citations, internal quotation marks, and ellipses omitted).⁵

5. Because it is undisputed that Saldierna was in custody and thus entitled to the protections of section 7B-2101 at the time of his interview with Kelly, the United States

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Indeed, section 7B-2101(b) recognizes that such “differentiating characteristics of youth” render certain juveniles particularly dependent on their parents (or other responsible adults) when faced with custodial interrogations:

When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile’s parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile’s rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

N.C. Gen. Stat. § 7B-2101(b). In other words, juveniles under the age of 14 *cannot waive* their rights to have either a parental figure or an attorney present when making an inculpatory statement while in custody, an additional protection not available to adults in a like situation. *See id.* We also take notice that our General Assembly, like the United States Supreme Court, appears to have found persuasive concerns about the special vulnerability of juveniles subject to custodial interrogations: In May 2015, it amended this statute, applicable to offenses committed on or after 1 December 2015 to extend the special protections of subsection 7B-2101(b) to any juvenile “less than 16 years of age[.]” *See* 2015 N.C. Sess. Laws 58. While we recognize that this amendment would not have applied to Saldierna, even had it been in effect at the time of the then-16-year-old’s custodial interrogation, we find it instructive that the lawmakers elected by the citizens of our State have determined that children only months younger than Saldierna *can never waive* the right to have a parental figure or attorney present during such a high-stakes and potentially life-altering procedure. This determination by our legislative branch lends significant additional support to our holding: That an ambiguous statement touching on a juvenile’s right to have a parent

Supreme Court’s decision in *J.D.B.* is not directly applicable to Saldierna’s argument on appeal. *See J.D.B.*, ___ U.S. at ___, 180 L. Ed. 2d at 318 (holding that “the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*”). Nonetheless, this discussion of the well-recognized distinctions between children and adults in various everyday and legal contexts provides a useful framework for understanding the provisions of section 7B-2101 and resolving the issues before us in this case.

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present during an interrogation triggers a requirement for the interviewing officer to clarify the juvenile's meaning.⁶

In sum, in reviewing the trial court's order denying Saldierna's motion to suppress his confession, we conclude that the findings of fact regarding the ambiguous nature of Saldierna's statement, "Can I call my mom[,]," are supported by competent evidence. However, because we conclude that Saldierna's ambiguous statement required Kelly to clarify whether he was invoking his right to have a parent present during the interview, we hold that the trial court erred in concluding that Kelly complied with the provisions of section 7B-2101. Accordingly, we reverse the trial court's order, vacate the judgments entered upon Saldierna's guilty pleas, and remand to the trial court with instructions to grant the motion to suppress and for further proceedings.

VACATED, REVERSED, and REMANDED.

Judges BRYANT and DIETZ concur.

6. We find telling Kelly's response when, just after asking to call his mother, Saldierna explained that he believed she was on her lunch break at that time: "You want to call her *now before we talk?*" (Emphasis added). Kelly's question indicates that she believed Saldierna *might be* asking to delay the interview, at least until he had a chance to speak to his mother. The trial court's unchallenged finding of fact establishes that Saldierna was not able to reach his mother before Kelly resumed her questioning.

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STATE OF NORTH CAROLINA

v.

TEON JAMELL WILLIAMS, DEFENDANT

No. COA14-1101

Filed 21 July 2015

1. Drugs—amended indictment—identity of controlled substance—essential element of crime

The trial court erred by allowing the State to amend Count One of the indictment charging defendant with possession with intent to manufacture, sell, or deliver a Schedule 1 substance by changing the name of the substance from “Methylethcathinone” to “4-Methylethcathinone.” The identity of the controlled substance is an essential element of the crime. The amendment, which added an essential element, therefore was a substantial alteration and impermissible. The Court of Appeals vacated defendant’s conviction for this charge.

2. Drugs—indictment—possession with intent to manufacture, sell, or deliver a Schedule 1 substance—catch-all provision

The Court of Appeals rejected defendant’s argument that Count Two of the indictment charging him with possession with intent to manufacture, sell, or deliver a Schedule 1 substance was defective. The indictment was not required to state that the substances at issue were Schedule 1 solely by virtue of their conformity with characteristics set forth in the “catch-all” provision of N.C.G.S. § 90-89(5)(j).

3. Drugs—maintaining a dwelling—motion to dismiss

The trial court did not err by denying defendant’s motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. The State presented sufficient evidence that defendant resided at the place where the substance was seized and that the residence was being used for keeping or selling controlled substances.

Appeal by defendant from judgments entered 10 January 2014 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 3 February 2015.

Roy Cooper, Attorney General, by Richard E. Slipsky, Special Deputy Attorney General, for the State.

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Staples Hughes, Appellate Defender, by Hannah H. Love, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Teon Jamell Williams (“Defendant”) appeals from his convictions for two counts of possession with intent to manufacture, sell, or deliver (“PWIMSD”) a Schedule I substance, one count of maintaining a dwelling for the purpose of keeping or selling a controlled substance, and having attained the status of an habitual felon. On appeal, he argues that the trial court erred in (1) allowing the State to amend one count of its indictment charging Defendant with PWIMSD; (2) entering judgment on the two counts of PWIMSD because the indictment, even as amended, was fatally defective such that the trial court lacked subject matter jurisdiction; (3) denying his motion to dismiss one of the counts of PWIMSD; and (4) denying his motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. After careful review, we find no error in part and vacate in part.

Factual Background

The State presented evidence at trial tending to establish the following facts: In the spring of 2013, Defendant and Laura Morrison (“Morrison”) were living together in a mobile home on Oak Knoll Drive in Iredell County, North Carolina with Morrison’s children. Both Defendant and Morrison were on supervised probation at the time, and Morrison’s probation officer, Randy McDaniel (“McDaniel”), arranged to conduct a search of the residence pursuant to a condition of Morrison’s probation that she submit to warrantless searches of her person, property, vehicle, or residence conducted by a probation officer at reasonable times. McDaniel proceeded to contact Defendant’s probation officer, Alex Cashion (“Cashion”), to inform her of his intention to perform a search of the residence.

On 1 May 2013 at approximately 12:30 p.m., McDaniel and Cashion arrived at the Oak Knoll Drive residence to conduct the search. Defendant answered the door and informed the officers that he was alone in the home. Cashion told Defendant of their intention to search the residence, and Defendant consented to the search. Investigator Tenita Huffman (“Investigator Huffman”) of the Statesville Police Department arrived at the residence shortly thereafter to assist McDaniel and Cashion in executing the search.

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The Oak Knoll Drive residence had two bedrooms with Morrison and Defendant occupying the left bedroom and Morrison's children using the right bedroom. Investigator Huffman searched the left bedroom and observed that the closet within the bedroom contained both men's and women's clothing. She examined the articles of men's clothing hanging on the lower rack of the closet and proceeded to search through the pockets of approximately 20 pairs of pants. In the pocket of a pair of gray sweatpants, Investigator Huffman felt "a round ball" containing a "soft substance." When she removed the item from the pants pocket, she saw that it was a plastic bag that contained a white substance. She also observed that there were numerous plastic corner baggies¹ within the larger bag.

Because the Oak Knoll Drive residence did not lie within the Statesville city limits, the Iredell County Sheriff's Office was notified so that deputy sheriffs could come to the residence for the purpose of arresting Defendant. Deputies from the Sheriff's Office arrived at the residence and continued the search of the home. In addition to the plastic bag containing the white substance and corner baggies, officers also discovered a set of digital scales and \$460.00 in cash concealed in a Bible placed on top of a dresser in the left bedroom.

The white substance in the plastic bag was sent to the crime laboratory within the Sheriff's Office for testing. Misty Icard ("Icard"), a forensic drug chemist and the director of the crime laboratory, performed a series of tests on the substance to determine its properties. Icard concluded from the results of the tests that the substance "contained 4-methylethcathinone and methylone which are controlled substances also known as bath salts."

On 1 July 2013, a grand jury indicted Defendant on two counts of PWIMSD a Schedule I controlled substance, listing "Methylethcathinone" in Count One and "Methylone" in Count Two as the Schedule I substances Defendant possessed. The grand jury also issued bills of indictment charging Defendant with maintaining a dwelling to keep or sell controlled substances and with having attained habitual felon status. On 19 December 2013, the trial court granted the State's motion to amend the PWIMSD indictment to add the numerical prefix "4-" to Count One of the indictment, thereby alleging that Defendant possessed

1. A "corner baggie" was defined by Investigator Huffman during her trial testimony as "the corner of a plastic baggie that's been snipped off" to form a smaller bag.

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“4-Methylethcathinone” (instead of “Methylethcathinone” as Count One of the indictment had originally alleged).

A jury trial was held beginning on 8 January 2014 in Iredell County Superior Court before the Honorable Julia Lynn Gullett. The jury found Defendant guilty of all charges, and the trial court entered judgment on the jury’s verdicts. Defendant was sentenced to two consecutive terms of 90 to 120 months imprisonment. Defendant gave notice of appeal in open court.

Analysis**I. Indictment for PWIMSD Charges**

Defendant raises two distinct challenges to the indictment for the PWIMSD charges. First, he asserts that the trial court erred in permitting the State to amend the indictment for Count One of the PWIMSD charge. Second, he contends that notwithstanding the amendment, the indictment for both Count One and Count Two remained fatally defective. We address each of these arguments in turn.

A. Amendment of Indictment as to Count One

[1] Defendant’s first argument is that the trial court erred by permitting the State to amend Count One of the indictment charging him with PWIMSD by changing the substance Defendant allegedly possessed from “Methylethcathinone” to “4-Methylethcathinone.” (Emphasis added.)

It is well established that “[a] felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged.” *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). An indictment that “fails to state some essential and necessary element of the offense” is fatally defective, *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (citation and quotation marks omitted), *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998), and if the indictment at issue is fatally defective, the superior court lacks subject matter jurisdiction over the case, *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012).

N.C. Gen. Stat. § 15A-923 provides that “[a] bill of indictment may not be amended.” N.C. Gen. Stat. § 15A-923(e) (2013). “Our Supreme Court has interpreted the term ‘amendment’ under N.C.G.S. § 15A-923(e) to mean any change in the indictment which would substantially alter the charge set forth in the indictment.” *State v. De la Sancha Cobos*, 211 N.C. App. 536, 541, 711 S.E.2d 464, 468 (2011) (citation and quotation marks omitted). “In determining whether an amendment is a substantial

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alteration, we must consider the multiple purposes served by indictments, the primary one being to enable the accused to prepare for trial.” *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006) (citation and quotation marks omitted).

This Court has held that (1) amending an indictment to add an essential element to the allegations contained therein constitutes a substantial alteration and is therefore impermissible, *see De la Sancha Cobos*, 211 N.C. App. at 541, 711 S.E.2d at 468; while (2) an amendment that simply corrects an error unconnected and extraneous to the allegations of the essential elements of the offense is not a substantial alteration and is permitted, *see State v. White*, 202 N.C. App. 524, 529, 689 S.E.2d 595, 598 (2010) (explaining that amendment to nonessential language in indictment did not fundamentally alter nature of charge asserted because “[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage” (citation and quotation marks omitted)).

In order to address Defendant’s argument, it is necessary to understand the statutory framework classifying controlled substances and setting out the penalties for manufacturing, selling, delivering, and possessing such substances. The North Carolina Controlled Substances Act lists and categorizes various drugs, substances, and immediate precursors into six schedules. N.C. Gen. Stat. § 90-87(5) (2013). N.C. Gen. Stat. § 90-95 provides that possession of a Schedule I substance with the intent to manufacture, sell, or deliver is a Class H felony. N.C. Gen. Stat. § 90-95(a)(1), (b)(1) (2013).

Substances classified under Schedule I — the schedule relevant to Defendant’s convictions for PWIMSD — are listed in N.C. Gen. Stat. § 90-89. Schedule I substances have been deemed to require the highest level of state regulation and have “a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision.” N.C. Gen. Stat. § 90-89 (2013). Schedule I lists various opiates, opium derivatives, hallucinogens, depressants, and stimulants by their chemical and trade names. Among the Schedule I stimulants are cathinones, a class of drugs that have a base chemical structure of 2-amino-1-phenyl-1-propanone. N.C. Gen. Stat. § 90-89(5)(b). In light of the multitude of ways in which a synthetic, or man-made, cathinone can be derived and modified from this base structure, N.C. Gen. Stat. § 90-89(5) also includes a “catch-all” provision in subsection (j) of the statute, which encompasses — and classifies as Schedule I substances — the universe of substances that are formed through the following variations on the cathinone base structure:

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A compound, other than bupropion, that is structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways: (i) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents; (ii) by substitution at the 3-position with an alkyl substituent; or (iii) by substitution at the nitrogen atom with alkyl or diakyl groups or by inclusion of the nitrogen atom in a cyclic structure.

N.C. Gen. Stat. § 90-89(5)(j).

Thus, pursuant to this statutory provision, compounds that are both (1) derived from the base structure of a cathinone; and (2) chemically modified in one of the three statutorily-defined ways, fall within Schedule I of the Controlled Substances Act. *See id.* Such synthetic compounds are commonly referred to as “bath salts,” and according to the testimony of Icard, the State’s expert witness at trial, 4-methylethcathinone and methylone are two examples of substances falling into this category.

Our caselaw establishes that “[w]hen a defendant has been charged with possession of a controlled substance, the identity of the controlled substance that defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment.” *State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 784-85, 625 S.E.2d 604, 605, *disc. review denied*, 360 N.C. 484, 631 S.E.2d 133 (2006). In *Ahmadi-Turshizi*, the defendant was charged with various drug offenses by means of indictments that “identified the controlled substance that he allegedly possessed, sold and delivered as ‘methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act.’” *Id.* at 785, 625 S.E.2d at 605. We held that the indictments were defective because they omitted the numerical prefix from the chemical name of the substance possessed by the defendant. *Id.* at 786, 625 S.E.2d at 606.

Defendant’s indictment listed the controlled substance he allegedly possessed, sold, and delivered to be “methylenedioxymethamphetamine” but failed to include “3,4” as required. Schedule I does not include any substance which contains any quantity of “methylenedioxymethamphetamine.” As the substance listed in defendant’s indictment does not appear in Schedule I of our Controlled Substances Act, the indictment is fatally flawed and each

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of defendant's convictions for felonious possession of methylenedioxymethamphetamine, with the intent to sell and deliver, sale of methylenedioxymethamphetamine, and delivery of methylenedioxymethamphetamine, must be vacated.

Id. at 786, 625 S.E.2d at 605-06.

In so holding, we relied upon *State v. Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412, *disc. review denied*, 360 N.C. 73, 622 S.E.2d 624 (2005), in which this Court similarly vacated the defendant's conviction of a possessory offense because the indictment did not include the numerical prefix of the controlled substance and thus did not correspond with the substance as listed in the Controlled Substances Act. We concluded that the omission of the numerical prefix was a defect that could not be regarded as a "mere technicality, for the chemical and legal definition of these substances is itself technical and requires precision." *Id.* at 332, 614 S.E.2d at 415 (citation and quotation marks omitted). Therefore, because the substance described in the defendant's indictment was not a Schedule I controlled substance, we held that the indictment charging the defendant with possession of a Schedule I controlled substance was fatally defective. *Id.* at 333, 614 S.E.2d at 415.

The State attempts to distinguish the present case from *Ledwell* and *Ahmadi-Turshizi* on essentially two grounds. First, the State notes that unlike in those cases, the controlled substance at issue here is not specifically listed by name in Schedule I of the Controlled Substances Act. Rather, 4-methylethcathinone — the substance that forms the basis of Count One of Defendant's indictment — constitutes a Schedule I substance under the "catch-all" provision of N.C. Gen. Stat. § 90-89(5)(j).

Because 4-methylethcathinone is not specifically listed by name in Schedule I, the State contends that (1) the omission of the prefix "4-" in the original indictment in the present case is less problematic than the omission of the numerical prefixes in *Ledwell* and *Ahmadi-Turshizi*; and (2) amending the indictment to include the prefix was merely the correction of a clerical error rather than a substantial alteration. We are unable to agree.

The State does not contend that methylethcathinone — the substance identified in Defendant's *original* indictment in Count One — is classified as a Schedule I controlled substance. However, it is undisputed by the parties that 4-methylethcathinone is a Schedule I controlled substance because it meets the conditions of N.C. Gen. Stat. § 90-89(5)(j), the "catch-all" provision, in that it is (1) structurally derived from

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2-amino-1-phenyl-1-propanone; and (2) modified from that base structure in ways that are described within subsection (j).

An indictment that charges a defendant with PWMSD a Schedule I substance must allege the possession of a substance that falls within Schedule I. The original indictment as to Count One did not satisfy this requirement, and as such, it was fatally defective. *See Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (holding that possession of Schedule I controlled substance indictment was “facially insufficient” where it failed to allege substance actually classified in Schedule I). Thus, the amendment here cannot be described as a mere alteration to language extraneous to the allegations of the essential elements of the offense because — to the contrary — the amended language *supplied* an essential element to Count One that was previously lacking in the indictment for this charge.²

Second, the State argues that *Ledwell* and *Ahmadi-Turshizi* are distinguishable because the defendants in those cases “were actually tried on the faulty charges” whereas here, the State was permitted to amend the indictment and Defendant was then tried pursuant to the amended indictment. However, because we hold that the amendment effectively added an essential element that was previously absent, it constituted a substantial alteration and, as a result, was legally impermissible. *See De la Sancha Cobos*, 211 N.C. App. at 542, 711 S.E.2d at 469 (where fatally flawed indictment was “[m]aterially amend[ed]” in attempt to cure defect, defendant’s conviction must be vacated). As such, because the amendment here could not cure the defective nature of the original indictment, the distinction argued by the State does not change our conclusion that Defendant’s conviction on Count One cannot stand.

Finally, the State notes that Defendant did not object to the amendment. However, Defendant’s acquiescence to the amendment is irrelevant to our analysis because “a party cannot consent to subject matter jurisdiction.” *Id.*; *see also LePage*, 204 N.C. App. at 49, 693 S.E.2d at 165 (explaining that the facial insufficiency of an indictment and the

2. The State argues that *State v. Davis*, 223 N.C. App. 296, 733 S.E.2d 191 (2012), is more analogous to the present case than *Ledwell* or *Ahmadi-Turshizi* because it also involved a “catch-all” statutory provision. However, *Davis* addressed whether a fatal variance existed between the indictment and the proof at trial regarding the defendant’s charge of trafficking in opium — *not* whether the indictment itself was fatally defective by failing to properly allege a controlled substance (such that the trial court lacked subject matter jurisdiction over the case in the first place). *Id.* at 299, 733 S.E.2d at 192-93. As such, *Davis* is not applicable.

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resulting lack of jurisdiction by the trial court “may be challenged at any time, notwithstanding a defendant’s failure to contest its validity in the trial court”). Accordingly, we conclude that Defendant’s conviction on Count One of PWIMSD must be vacated.

B. Alleged Failure of Indictment to Adequately Apprise Defendant of Charges

[2] Defendant next argues that the PWIMSD indictment was also facially invalid because it did not specifically indicate that the substances at issue were Schedule I controlled substances solely by virtue of their conformity with the characteristics set forth in the “catch-all” provision of N.C. Gen. Stat. § 90-89(5)(j). Defendant contends that in order to be valid, an indictment charging a defendant with PWIMSD a Schedule I controlled substance must provide notice of the State’s “intent to prosecute a defendant for possession of a substance falling within the catch-all provision of § 90-89(5)(j) where the substance is not otherwise named in the statute.” Because we have already vacated Count One of the charge of PWIMSD, we need only address Count Two of the indictment, which asserts that Defendant possessed “Methylone, which is included in Schedule I of the North Carolina Controlled Substances Act.”

On appeal, this Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). “The purpose of an indictment is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused.” *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (citation, quotation marks, brackets, and ellipses omitted). Consequently, as discussed in the previous section, “[a]n indictment . . . charging a statutory offense must allege all of the essential elements of the offense.” *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975); *see also* N.C. Gen. Stat. § 15A-924(a)(5) (explaining that indictment must contain allegations supporting every essential element of criminal offense in order to be valid). The offense of PWIMSD under N.C. Gen. Stat. § 90-95(a)(1) has the following three elements: (1) possession of a substance; (2) that is a controlled substance; and (3) with the intent to manufacture, sell, or deliver that controlled substance. *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001).

Here, Count Two of the PWIMSD indictment alleges each of these essential elements. It states that (1) Defendant possessed methylone; (2) methylone is a controlled substance “which is included in Schedule I”; and (3) Defendant possessed the methylone with the intent to

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manufacture, sell, or deliver it. While the indictment for Count Two does not reference the specific subsection of N.C. Gen. Stat. § 90-89 that makes methylone *a Schedule I controlled substance*, the indictment sufficiently apprised Defendant of the nature of the charge against him by both tracking the language of N.C. Gen. Stat. § 90-95(a)(1) *and* alleging the possession of a substance that is, in fact, *a Schedule I controlled substance* (unlike the original indictment relating to Count One). As such, we do not believe that the indictment was required to expressly state the fact that methylone, while not expressly mentioned by name in N.C. Gen. Stat. § 90-89, falls within the “catch-all” provision of N.C. Gen. Stat. § 90-89(5)(j). *See State v. Harris*, 219 N.C. App. 590, 592-93, 724 S.E.2d 633, 636 (2012) (“The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” (citation and quotation marks omitted)). Defendant’s argument on this issue is therefore overruled.

II. Denial of Motion to Dismiss

Defendant next contends that the trial court erred in denying his motions to dismiss as to (1) one count of PWIMSD; and (2) the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. We address each of his contentions in turn.

A. PWIMSD

Defendant argues that because N.C. Gen. Stat. § 90-89(5) states that “any material, compound, *mixture*, or preparation that contains any quantity of” a substance that meets the characteristics of subsection (j) is a Schedule I substance, the evidence presented at trial was only sufficient to support one count — rather than two counts — of PWIMSD because the substance found at Defendant’s residence was a *mixture* of two such compounds contained within a single bag. N.C. Gen. Stat. § 90-89(5) (emphasis added). For this reason, he contends, the trial court should have allowed only *one* count of PWIMSD to go to the jury. In making this argument, Defendant does not challenge the sufficiency of the evidence to support his conviction of possession of methylone with intent to manufacture, sell, or deliver; instead, he only contests the adequacy of the evidence to support two separate counts of PWIMSD.

However, Defendant’s argument on this issue is premised on the fact that he was convicted of *both* counts of PWIMSD. Because, as discussed above, we are vacating his conviction as to Count One, we need not address this issue.

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B. Maintaining a Dwelling for the Purpose of Keeping or Selling a Controlled Substance

[3] Finally, Defendant contends that the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance because the State failed to establish either that (1) Defendant kept or maintained the Oak Knoll Drive residence; or (2) Defendant used the Oak Knoll Drive residence for the purpose of keeping or selling a controlled substance. We disagree.

In order to survive a defendant's motion to dismiss as to this charge, the State must present substantial evidence that the defendant "(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance." *State v. Fuller*, 196 N.C. App. 412, 424, 674 S.E.2d 824, 832 (2009) (citation and quotation marks omitted).

1. "Kept or Maintained a Dwelling" Element

With regard to the first element of the offense, "[f]actors which may be taken into consideration in determining whether a person keeps or maintains a dwelling include ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent." *State v. Baldwin*, 161 N.C. App. 382, 393, 588 S.E.2d 497, 506 (2003). None of the above factors is dispositive, and the court must consider the totality of the circumstances when determining whether the evidence was sufficient to support the conclusion that the defendant kept or maintained the dwelling. *Id.*; *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001).

Here, the State put forth evidence that (1) Defendant received mail addressed to him at the Oak Knoll Drive residence; (2) Defendant's probation officer had visited Defendant at the Oak Knoll Drive residence on numerous occasions, "most likely in excess of 10 [times]" to conduct "routine home contacts" in order to ensure that Defendant was in compliance with the conditions of his probation; (3) several of Defendant's personal effects were recovered during the search of the residence, including a pay stub and protective gear from Defendant's employment; and (4) Defendant placed a phone call from the Iredell County Detention Center and informed the other party on the line that law enforcement officers had "come and searched *his* house and found two ounces of Molly."³ (Emphasis added.) Defendant argues that this evidence was

3. Icard testified at trial that "Molly" is a street name that is used to refer to both ecstas and bath salts.

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insufficient to show that he “maintained or kept” the dwelling because while it indicated that he “lived in the house” at Oak Knoll Drive, it did not demonstrate that he was financially or otherwise responsible for the dwelling and its upkeep.

This Court has previously explained that although “*occupancy*, without more, will not support the element of ‘maintaining’ a dwelling evidence of *residency*, standing alone, *is* sufficient to support the element of maintaining.” *State v. Cowan*, 194 N.C. App. 330, 337, 669 S.E.2d 811, 817 (2008) (citation, quotation marks, and alterations omitted and emphasis added); *see also State v. Shine*, 173 N.C. App. 699, 707, 619 S.E.2d 895, 900 (2005) (concluding that “the trial judge properly found that a reasonable jury could conclude that defendant kept or maintained [the] property” where defendant’s probation officer “visited him at the property five weeks prior to the execution of the search warrant, and defendant confirmed it was his residence”). Indeed, in *State v. Spencer*, 192 N.C. App. 143, 664 S.E.2d 601 (2008), *disc. review denied*, 363 N.C. 380, 680 S.E.2d 208 (2009), this Court expressly held that a defendant’s own statement that he resided at the dwelling in question constituted “substantial evidence that defendant maintained [that] dwelling” and was sufficient to withstand the defendant’s motion to dismiss the charge of maintaining a dwelling for the keeping or selling of a controlled substance. *Id.* at 148, 664 S.E.2d at 605.

In his brief, Defendant asserts that our more recent precedents involving this issue such as *Spencer* are inconsistent with our prior decisions in *State v. Bowens*, 140 N.C. App. 217, 535 S.E.2d 870 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001); *State v. Kraus*, 147 N.C. App. 766, 557 S.E.2d 144 (2001); and *State v. Harris*, 157 N.C. App. 647, 580 S.E.2d 63 (2003), and should be disregarded on that basis. In *Bowens*, *Kraus*, and *Harris*, however, the evidence presented by the State only demonstrated that the defendant temporarily occupied the building or dwelling in question and did not establish that the defendant actually lived there. *See Harris*, 157 N.C. App. at 652-53, 580 S.E.2d at 66-67 (evidence showing defendant was seen at residence “several times over a period of two months” and had some personal papers at residence, none of which listed residence’s address as his address, was insufficient to establish that defendant maintained residence); *Kraus*, 147 N.C. App. at 769, 557 S.E.2d at 147 (evidence that defendant occupied motel room “for less than twenty-four hours” and had access to room key was insufficient to show that defendant maintained motel room to keep or sell controlled substances); *Bowens*, 140 N.C. App. at 221-22, 535 S.E.2d at 873 (evidence was insufficient to support charge

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of maintaining dwelling to keep or sell controlled substances where defendant was seen entering and exiting dwelling eight to ten times over course of two to three days and police officer testified that he “believed” Defendant lived at dwelling but “offered no basis for that opinion”).

As such, we discern no inconsistency between *Spencer* and *Bowens*, *Kraus*, and *Harris*. Therefore, we hold that the State’s evidence in the present case that Defendant resided at the Oak Knoll Drive residence was sufficient to support the jury’s finding as to the element of the offense that he maintained or kept a dwelling.

2. “For the Purpose of Keeping or Selling” Element

With regard to the third element of this offense, Defendant argues that the State failed to establish that the Oak Knoll Drive residence was used for keeping or selling a controlled substance. “In determining whether a defendant maintained a dwelling for the purpose of selling illegal drugs, this Court has looked at factors including the amount of drugs present and paraphernalia found in the dwelling.” *State v. Battle*, 167 N.C. App. 730, 734, 606 S.E.2d 418, 421 (2005) (emphasis omitted). Our Court has also noted that the discovery of “a large amount of cash” in the dwelling or building can indicate that a particular place is being used to keep or sell controlled substances. *Frazier*, 142 N.C. App. at 366, 542 S.E.2d at 686.

Here, the State presented evidence that a bag containing 39.7 grams of a substance consisting of 4-methylethcathinone and methylone was discovered inside the pocket of a pair of men’s pants within Defendant’s bedroom closet alongside another plastic bag, which contained “numerous little corner baggies.” A set of digital scales and \$460.00 in twenty dollar bills were also found in Defendant’s bedroom. The State elicited testimony from a Statesville Police Department narcotics officer that (1) corner baggies are typically used when drugs are packaged and sold in smaller amounts; (2) digital scales are often utilized in the sale of narcotics to “weigh out specific amounts of narcotics”; and (3) purchases of controlled substances are frequently made in \$20 increments.

We conclude that this evidence was sufficient to permit “a reasonable jury to conclude that the residence in question was being used for keeping or selling controlled substances.” *Shine*, 173 N.C. App. at 708, 619 S.E.2d at 900 (evidence that digital scales “of the type frequently used to weigh controlled substances” were found in residence in close proximity to two bags of cocaine and pieces of scrap paper with names and dollar amounts written on them was sufficient to show residence was used for keeping or selling controlled substances); see *State v. Rich*,

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87 N.C. App. 380, 383-84, 361 S.E.2d 321, 324 (1987) (evidence of “materials related to the use and sale of cocaine,” which included two bags of cocaine of differing levels of purity, numerous small plastic bags, and tools “commonly used in repackaging and selling cocaine,” was sufficient to sustain conviction for maintaining dwelling for purpose of keeping or selling controlled substances). Accordingly, Defendant’s argument on this issue lacks merit.

Conclusion

For the reasons stated above, we vacate Defendant’s conviction on Count One of PWIMSD arising from Defendant’s possession of 4-methylcathinone. We conclude that the trial court did not err in entering judgment on Defendant’s convictions for the remaining charges, and those convictions shall remain undisturbed.⁴

NO ERROR IN PART; VACATED IN PART.

Judges ELMORE and TYSON concur.

4. When the trial court entered judgment, it sentenced Defendant to 90 to 120 months imprisonment for Count One of PWIMSD. In a separate judgment, the trial court consolidated Count Two of PWIMSD with the maintaining a dwelling for the purpose of keeping or selling a controlled substance offense and sentenced Defendant to a second term of 90 to 120 months to run consecutively. Because we are vacating Count One, which was not consolidated for judgment with Defendant’s other convictions, we need not remand to the trial court for resentencing. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (explaining that remanding for resentencing is necessary only when conviction being vacated was consolidated with other convictions that were upheld on appeal).

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[242 N.C. App. 375 (2015)]

THE TIMES NEWS PUBLISHING COMPANY D/B/A *TIMES-NEWS*, PLAINTIFF

v.

THE ALAMANCE-BURLINGTON BOARD OF EDUCATION, D/B/A ALAMANCE-BURLINGTON SCHOOLS OR THE ALAMANCE-BURLINGTON SCHOOL SYSTEM; & DR. WILLIAM HARRISON, IN HIS CAPACITY AS INTERIM SUPERINTENDENT OF ALAMANCE-BURLINGTON SCHOOL SYSTEM, DEFENDANTS

No. COA15-99

Filed 21 July 2015

Public Records—school board—closed session—resignation of superintendent—in camera review

The minutes of a school board's closed meeting at which the superintendent resigned and was given a \$200,000 severance package should have been examined in camera by the trial court judge after plaintiff requested the minutes and defendant claimed that they concerned an exempt personnel matter. Core personnel information such as the details of work performance and the reasons for an employee's departure remain permanently exempt from disclosure. But other aspects of the board's discussion in the closed session, including the board's own political and policy considerations, are not protected from disclosure. On remand, the trial court must review the minutes and determine which information is exempt from disclosure and which should be disclosed to the public. Furthermore, when the trial court's determination following an in camera review is disputed by the public body seeking to avoid disclosure, the trial court (or the appellate court, where necessary) should not hesitate to stay the disclosure order pending appeal by the aggrieved party.

Appeal by plaintiff from order entered 9 December 2014 by Judge Lucy N. Inman in Alamance County Superior Court. Heard in the Court of Appeals 6 April 2015.

The Bussian Law Firm, by John A. Bussian, for plaintiff-appellant.

Tharrington Smith, LLP, by Deborah R. Stagner, Neal A. Ramee, and Rebecca Fleishman, for defendants-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Mark J. Prak, Julia C. Ambrose, and Timothy G. Nelson, for amicus curiae North Carolina Association of Broadcasters and North Carolina Press Association.

TIMES NEWS PUBL'G CO. v. ALAMANCE-BURLINGTON BD. OF EDUC.

[242 N.C. App. 375 (2015)]

Christine T. Scheef and Allison B. Schafer for amicus curiae North Carolina School Boards Association.

DIETZ, Judge.

In October 2013, the superintendent of the Alamance-Burlington County Schools agreed to a new, four-year employment contract approved by the local school board. Just seven months later, the school board held a closed meeting where the superintendent abruptly resigned and the board approved a \$200,000 severance payment. The Times News Publishing Company then filed a request for the meeting minutes of the closed session so that it could report on the school board's handling of the superintendent's departure.

In particular, the Times News sought to learn why the school board paid \$200,000 in taxpayer money to a departing school employee just months after that employee signed a contract agreeing to stay for four more years. But the school board refused to hand over the minutes, arguing that the closed meeting concerned a "personnel matter" and therefore the meeting minutes were totally exempt from our State's public record and open meeting laws.

For the reasons discussed below, we reject the school board's argument that the closed meeting minutes are categorically exempt from public disclosure because they concern a personnel matter. Under Supreme Court precedent, a trial court presented with an Open Meetings Law claim concerning closed meeting minutes must review the minutes *in camera*—meaning in private, not in open court—and "tailor the scope of statutory protection in each case" based on the contents of the minutes and their importance to the public. *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 480, 412 S.E.2d 7, 16 (1992). As the Supreme Court explained, "[c]ourts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law." *Id.*

As explained below, under the test established in *Poole*, core personnel information such as the details of work performance and the reasons for an employee's departure will remain permanently exempt from disclosure. But other aspects of the board's discussion in the closed session, including the board's own political and policy considerations, are not protected from disclosure. On remand, the trial court must review

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the minutes and determine which information is exempt from disclosure and which should be disclosed to the public. Accordingly, we remand this case for an *in camera* review of the meeting minutes consistent with this opinion.

Facts and Procedural History

Dr. Lillie Cox became the Superintendent of the Alamance-Burlington School System in 2011. In October 2013, Dr. Cox and the Alamance-Burlington Board of Education agreed to extend Dr. Cox's contract to 2017. Seven months later, on 30 May 2014, Dr. Cox abruptly resigned from her position after a closed meeting of four of the seven members of the school board. The school board agreed to pay \$200,000 as a severance payment and to pay out \$22,000 in unused vacation pay.

On 6 October 2014, Plaintiff Times News Publishing Company made a written request to the school board for access to the meeting minutes "for purposes of inspection, examination, and copying pursuant to the Public Records Act." The Times News specifically requested the "production of the unredacted minutes of the Alamance-Burlington Board of Education's specially called meeting or meetings, including any closed sessions in or about May of 2014 relating to the continued employment of the then current Superintendent of Schools." The school board did not produce the unredacted meeting minutes.

On 24 October 2014, the Times News filed a complaint and application for an order compelling disclosure of the unredacted meeting minutes, alleging that the school board violated the Open Meetings Law and Public Records Act by refusing to produce the minutes. The school board filed a motion to dismiss and answer on 19 November 2014. On 1 December 2014, the trial court held a hearing on the motion to dismiss. The trial court granted the motion, concluding "that the records sought by plaintiffs are not public records subject to disclosure under the Public Records Act," and therefore the Times News "failed to state a claim for which relief can be granted." The Times News timely appealed.

Analysis

The crux of this case is the interplay between various state laws enacted to ensure public access to government records.

The first of these laws, and the most important for purposes of this case, is the Open Meetings Law. The Open Meetings Law generally requires that "each official meeting of a public body shall be open to the public, and any person is entitled to attend such meeting." N.C. Gen.

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Stat. § 143-318.10(a) (2013). The law permits “closed sessions” of a public body only in limited circumstances, including any meeting to discuss “the qualifications, competence, performance, character, [or] fitness, . . . of an individual public officer or employee.” N.C. Gen. Stat. § 143-318.11(a)(6).

The law also requires that “[e]very public body shall keep full and accurate minutes of all official meetings, including any closed sessions.” N.C. Gen. Stat. § 143-318.10(e). When a public body meets in a closed session,

it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. *Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.*

Id. (emphasis added). Thus, the Open Meetings Law provides (1) that minutes (or a recording) must be taken during closed sessions; (2) that those minutes “shall be public records within the meaning of the Public Records Law”; and (3) that those minutes “may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.” *Id.*

The second relevant law is the Public Records Act, which generally provides that “public records and public information” compiled by state and local governments “are the property of the people” and should be open to inspection by the public. N.C. Gen. Stat. § 132-1(b) (2013). Like the Open Meetings Law, the Public Records Act has exceptions. Among those exceptions is Section 115C-319 of the General Statutes, which states that “[p]ersonnel files of employees of local boards of education, former employees of local boards of education, or applicants for employment with local boards of education shall not be subject to inspection and examination” under the Public Records Act. N.C. Gen. Stat. § 115C-319 (2013). The term “personnel file” is defined, in relevant part, as “any information gathered by the local board of education” relating to “the individual’s application, selection or nonselection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation,

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disciplinary action, or termination of employment *wherever located or in whatever form.*" *Id.* (emphasis added). Thus, the Public Records Act, and its accompanying limitation in Section 115C-319, categorically prohibit public disclosure of certain personnel information of current and former school employees.

The central issue in this case is how these two laws interact. The school board contends that the minutes of the closed meeting are a "personnel file" because they contain "information gathered by the local board of education" concerning the superintendent's "termination of employment" and related personnel matters. Thus, the school board argues that the minutes are categorically exempt from public disclosure under N.C. Gen. Stat. § 115C-319.

The Times News contends that the minutes of the closed meeting, whether they are a "personnel file" or not, are governed by the Open Meetings Law, which provides that minutes may be withheld from the public only "so long as public inspection would frustrate the purpose of a closed session." N.C. Gen. Stat. § 143-318.10(e). Thus, the Times News argues that the trial court was required to conduct an *in camera* review of the minutes and to assess whether disclosure would frustrate the purpose of the closed session.

Our Court has never addressed this precise issue, but we find guidance in the Supreme Court's decision in *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). The plaintiffs in *Poole* sought (among other things) meeting minutes from a special commission formed to investigate "alleged improprieties relating to the men's basketball team at North Carolina State University." *Id.* at 470, 412 S.E.2d at 10. Although the Supreme Court held that the commission was not subject to the Open Meetings Law, the opinion addressed the interplay between that law and the Public Records Act. Specifically, the Supreme Court held that the Open Meetings Law "provides an exception to the Public Records Act for minutes, which would ordinarily be public records, so long as public inspection would frustrate the purpose of the executive session." *Id.* at 480, 412 S.E.2d at 16 (internal quotation marks omitted).¹ The Supreme Court then held that assessing whether disclosure would frustrate the purpose of a closed session "requires consideration of time and content factors, *allowing courts to tailor the scope of statutory*

1. The General Assembly moved the relevant statutory language from Section 143-318.11(d) to Section 143-318.10(e) two years after *Poole*, but the language itself did not change. See 1993 N.C. Sess. Laws 181.

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protection in each case.” *Id.* (emphasis added). The Supreme Court concluded with an instruction that lower courts “should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law.” *Id.*

Thus, our Supreme Court has established that the determination of whether information may be withheld under the Open Meetings Law because it would “frustrate the purpose of the closed session” is not a determination that can be made unilaterally by the public body that created the minutes. Instead, where the withholding of information is challenged in court, the court must review those minutes *in camera*—meaning in private, without revealing the contents in open court—using the balancing test from *Poole* quoted above.

But, importantly, in rejecting the Defendants’ argument that disclosure of the commission’s closed session minutes could chill “free and frank decision-making” by government agencies, the Supreme Court in *Poole* noted that this concern “must yield to the decision of the General Assembly, which enacted several specific exceptions to the Public Records Act, none of which *permanently protects* a deliberative process like that of the Commission after the process has ceased.” *Id.* at 481, 412 S.E.2d at 16 (emphasis added). In other words, the Supreme Court acknowledged that there are categories of “exceptions to the Public Records Act” that are permanent—meaning that passage of time is not a factor in whether that information should be released to the public. But the Supreme Court concluded that the information discussed by the special commission in *Poole* was not covered by any of those permanent statutory exceptions because the Commission was not the employer of the state employees mentioned in the meeting minutes. As a result, the minutes “d[id] not meet the definition of ‘personnel file’ information . . . because the information was not ‘gathered’ by the employer state agency.” *Id.* at 483, 412 S.E.2d at 18.

In light of this language from *Poole*, we hold that N.C. Gen. Stat. § 115C-319—which states that the “personnel files of employees of local boards of education, former employees of local boards of education, or applicants for employment with local boards of education shall not be subject to inspection and examination” under the Public Records Act—creates the type of permanent exception identified in *Poole*. If school personnel files were intended to remain confidential only while the individual remained employed by the school district, the General Assembly would not have applied the exception to “former employees.” *Id.* As

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it is written, the exception for personnel files is permanent and does not expire with the passage of time. Thus, under *Poole*, when a public body enters a closed session to discuss personnel information that falls within the scope of N.C. Gen. Stat. § 115C-319, disclosure of that personnel information *always* would frustrate the purpose of the closed session and thus may be withheld under N.C. Gen. Stat. § 143-318.10(e).

But that does not mean that *all* contents of closed session minutes in personnel cases are beyond disclosure. When a public body meets—particularly one made up of elected officials—the discussion of a personnel matter often could include political and policy considerations broader than the “core” personnel information described in Section 115C-319. Moreover, as we explained above, when the withholding is challenged in court, it is for the trial court, not the school board, to assess what is and is not subject to disclosure under this legal test.

In light of our holding today, we must remand this case to the trial court to conduct an *in camera* review of the meeting minutes consistent with this opinion and our Supreme Court’s decision in *Poole*. On remand, the trial court should separate core personnel information from other, related information that is subject to disclosure, keeping in mind the Supreme Court’s admonition in *Poole* that “[c]ourts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law.” *Poole*, 330 N.C. at 480, 412 S.E.2d at 16.²

In closing, we note that under the “personnel file” exception to the Public Records Act, many of the specific facts about the superintendent’s departure may remain permanently hidden from the public—perhaps an unintended outcome for a law meant to limit secrecy in government. But we are an error-correcting body, not a policy-making or law-making one. What we can say is that, even under the law as it is written today, there may be some information from the school board’s closed session that is subject to public disclosure. Accordingly, we remand this case to the trial court to conduct an *in camera* review of the contents of the closed meeting minutes.

2. We anticipate that there will be times when the trial court’s determination following *in camera* review is disputed by the public body seeking to avoid disclosure. Because the court system cannot un-ring the bell once information has been publicly disclosed, the trial court (or this Court, where necessary) should not hesitate to stay the disclosure

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Conclusion

We reverse and remand this case for the trial court to conduct an in camera review of the requested meeting minutes consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

order pending appeal by the aggrieved party. The General Assembly has instructed that these actions "shall be accorded priority by the trial and appellate courts," N.C. Gen. Stat. § 132-9(a), and thus the appeals process will be resolved far faster than ordinary litigation in the appellate courts.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JULY 2015)

BATTLE v. MEADOWBROOK MEAT CO., INC. No. 14-1059	N.C. Industrial Commission (13-708656)	Affirmed
CHARLES v. CHARLES No. 15-196	Cumberland (09CVD5873)	Affirmed in part, reversed and remanded in part
DENNY v. DENNY No. 14-770	Mecklenburg (12CVD3135)	Dismissed
DENNY v. DENNY No. 14-771	Mecklenburg (12CVD3135)	Reversed and Remanded
DOMINGUEZ v. FRANCISCO DOMINGUEZ MASONRY, INC. No. 14-1307	N.C. Industrial Commission (499636)	Affirmed
E. TOWN MKT., L.P. v. 550 FOODS, LLC No. 15-46	Mecklenburg (13CVS11727)	Affirmed
GREENSBORO SCUBA SCH., LLC v. ROBERTSON No. 14-1126	Guilford (12CVS9928)	Affirmed
HESTER v. HESTER No. 14-1335	Mecklenburg (11CVD18658)	Dismissed
IN RE A.C. No. 15-259	Wake (13JA136)	Affirmed
IN RE A.E.L. No. 15-27	Jackson (12JT20-22)	Affirmed
IN RE B.B.M.B. No. 14-1386	Johnston (12JT134)	Affirmed
IN RE J.A.K. No. 14-1383	Caldwell (13JA128)	Affirmed
IN RE JERRY'S SHELL, LLC No. 13-223-2	Rowan (12CVS660)	Affirmed
IN RE R.B.L. No. 14-1043	Alamance (13JB4)	No Error

IN RE T.H. No. 14-1146	Martin (12JB51) (13JB21)	Affirmed in part, vacated and remanded in part
JENSEN v. JESSAMY No. 15-35	Mecklenburg (13CVS12521)	Affirmed
JORDAN v. JORDAN No. 15-108	Union (12CVS3050)	Affirmed
MARSICO v. NEW HANOVER CNTY. BD. OF EDUC. No. 14-1370	New Hanover (14CVS1397)	Affirmed
PORTER v. BRYANT No. 14-1165	Mecklenburg (14CVD6337)	Affirmed
STATE v. BADSON No. 14-1321	Wake (12CRS206740)	No Error
STATE v. DAVIS No. 15-101	Wayne (11CRS50259) (13CRS5061)	No Error
STATE v. HAMLIN No. 14-1191	Transylvania (13CRS244) (13CRS247)	No Error
STATE v. INGRAM No. 14-1305	Avery (12CRS50621)	Vacated
STATE v. JEFFERIES No. 14-1313	Guilford (12CRS96692) (12CRS96694)	No Error
STATE v. LESTER No. 14-1392	No Error (13CRS55497-99) (14CRS89-90)	Buncombe
STATE v. MITCHELL No. 15-14	Wake (13CRS3110)	No Error
STATE v. PORTER No. 14-1032	Wake (13CRS222020)	No error in part; vacated in part; and remanded
STATE v. PROPST No. 15-59	Davidson (13CRS53730) (13CRS53731) (14CRS1194)	No Error

STATE v. SILVER No. 14-1213	Nash (12CRS52636)	No Error
STATE v. SMYRE No. 14-1178	Iredell (12CRS58005)	Dismissed
STATE v. WEEKS No. 15-81	Cleveland (12CRS51056) (1CRS3114-15)	No Error
WALKER v. HOLDEN TEMPORARIES, INC. No. 14-1389	N.C. Industrial Commission (Y03230)	Affirmed
WARD v. NUCAPITAL ASSOCS., INC. No. 14-1249	Wake (14CVD2595)	Reversed and Remanded
WELCH v. WILLEY No. 14-1264	Pitt (08CVD3727)	Reversed
WILLIS v. WILLIS No. 14-1090	Moore (13CVS1337)	Affirmed

ELLISON v. ELLISON

[242 N.C. App. 386 (2015)]

HANNELORE ELLISON, PLAINTIFF

v.

HENRY P. ELLISON, DEFENDANT (DECEASED)

AND

ELIZABETH SMITH-ELLISON, THIRD-PARTY DEFENDANT

No. COA14-1401

Filed 4 August 2015

1. Jurisdiction—in rem—military benefits

Where decedent disobeyed an equitable distribution order to name plaintiff (his ex-wife) as beneficiary of his military Survivors Benefit Plan and plaintiff thereafter joined third-party defendant (decedent's wife at the time of his death) to the original divorce action, the trial court did not err by declining to dismiss the third-party complaint for lack of personal jurisdiction over third-party defendant. The subject matter of controversy was property located in North Carolina, giving the trial court *in rem* jurisdiction.

2. Divorce—equitable distribution order—beneficiary of military benefits

Where decedent disobeyed an equitable distribution order to name plaintiff (his ex-wife) as beneficiary of his military Survivors Benefit Plan and plaintiff thereafter joined third-party defendant (decedent's wife at the time of his death) to the original divorce action, the trial court did not err by entering summary judgment in favor of plaintiff. A prior court order designated plaintiff as beneficiary of the plan, and third-party defendant failed to participate in the action.

Appeal by Third-Party Defendant from judgment entered 2 October 2014 by Judge A. Elizabeth Keever in District Court, Cumberland County. Heard in the Court of Appeals 18 May 2015.

Sullivan & Tanner, P.A., by Mark E. Sullivan, for Plaintiff-Appellee.

Lewis, Deese, Nance, Briggs & Hardin, LLP, by Renny W. Deese, for Third-Party Defendant-Appellant.

McGEE, Chief Judge.

ELLISON v. ELLISON

[242 N.C. App. 386 (2015)]

Hannelore Ellison (“Plaintiff”) and Henry P. Ellison (“Mr. Ellison”)¹ were married on 22 June 1972, and had three children together. Plaintiff and Mr. Ellison separated in March of 1997. The trial court entered an equitable distribution order on 30 April 2002 in which “[t]he parties agree[d] that the contents of [the] order represents their agreement as to their marital property division and the same shall be a full and final settlement of any pending claims for equitable distribution.” Pursuant to the 30 April 2002 order, Mr. Ellison was “ordered to maintain the Survivors Benefit Plan [“SBP”] on his pension naming . . . Plaintiff as beneficiary. [Mr. Ellison] shall immediately execute any forms or make necessary arrangements to insure . . . Plaintiff is listed as the beneficiary.” At the time of the 30 April 2002 order, Mr. Ellison was retired from the United States Army and was receiving retirement benefits. The SBP is a plan, managed by the Defense Finance and Accounting Service (“DFAS”), available to eligible military retirees whereby some retirement pay is withheld monthly to participate in a plan to provide a surviving spouse, former spouse, or other designate, with monthly benefits upon the death of the participating serviceperson. Because Plaintiff and Mr. Ellison were married when Mr. Ellison retired, Plaintiff became the beneficiary of the SBP upon Mr. Ellison’s retirement. 10 U.S.C. § 1448(a). Plaintiff and Mr. Ellison were divorced on 7 December 2006, and Mr. Ellison re-married twice. His second wife died, and he married Elizabeth Smith-Ellison (“Defendant”) on 19 January 2010. Mr. Ellison died on 20 November 2011.

Mr. Ellison failed to designate Plaintiff as the former spouse beneficiary of the SBP as required by the 30 April 2002 order.² Plaintiff failed to obtain a “deemed election” within the one-year period following entry of the 30 April 2002 equitable distribution order, or within one year following entry of the divorce decree on 7 December 2006, which incorporated

1. Mr. Ellison was the defendant in the original divorce action. Elizabeth Ellison was brought into this action as the third-party defendant. However, because Elizabeth Ellison is the relevant party in this appeal, we will refer to her simply as “Defendant”.

2. Defendant, citing 10 U.S.C. 1448(b)(3)(A)(II)(iii), contends that Mr. Ellison was required to make the election of Plaintiff as beneficiary within one year of the entry of the divorce decree. However, 10 U.S.C. 1448(b)(2), not 10 U.S.C. 1448(b)(3), is the applicable paragraph in this case. Unlike 10 U.S.C. 1448(b)(3), 10 U.S.C. 1448(b)(2) does not contain a time limit for the serviceperson to make an election of a former spouse as beneficiary. Because Mr. Ellison is deceased and cannot make an election, we do not address whether there is any time limit for election of a former spouse pursuant to 10 U.S.C. 1448(b)(2).

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the 30 April 2002 order, as required by 10 U.S.C. § 1450(f)(3).³ Plaintiff apparently did not realize, until after Mr. Ellison's death in 2011, that Mr. Ellison had failed to abide by the trial court's order, and had not elected her as beneficiary of the SBP. At that time, according to Plaintiff, DFAS informed her that her only recourse was to apply to the Army Board for the Correction of Military Records ("the Board"), seeking to have them change the designated beneficiary on Mr. Ellison's SBP records to Plaintiff.

According to Plaintiff, the Board informed her that it could not act on applications for correcting SBP beneficiary designations without either: the consent of all interested parties who may have an interest in the benefit, or a court order finding that the individual concerned [Defendant] has no right to the SBP payments . . . where the individual [Defendant] has been made a party to the action in which the said order is entered.

The trial court found as fact in its 9 June 2014 order for joinder:

In order for the court-awarded SBP payments to be effectuated to [] Plaintiff, she must have either: a notarized affidavit from [Defendant] relinquishing her rights to the benefit in favor of [] Plaintiff, or an order declaring that [] Plaintiff is the rightful beneficiary of the benefit. The [Board] requires that [Defendant] be joined as a party before said order is entered.

Apparently Defendant was not willing to give the required consent. If Plaintiff were to obtain the order requested by the Board, the Board would then consider her application. If the Board changes the record to indicate Plaintiff is the designated beneficiary of the SBP, Plaintiff could then apply to DFAS seeking to have them recognize her as the legitimate beneficiary, and provide her with the SBP benefits.

Plaintiff filed a motion on 28 May 2014 to join Defendant as a third-party defendant in her original divorce action. Plaintiff filed

3. The 7 December 2006 order granting divorce incorporated the 10 April 2002 equitable distribution order, and further ordered both parties to do whatever was necessary "to effectuate the provisions of this Decree." Because it is irrelevant whether the 10 April 2002 order or the 7 December 2006 order constitutes the last order directing Mr. Ellison to elect Plaintiff as the SBP beneficiary, we do not reach a decision concerning whether the order for divorce constituted a new and enforceable order for the purposes of 10 U.S.C. § 1450(f)(3).

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a third-party complaint against Defendant on 23 June 2014 seeking an order ruling that Defendant “has no interest in the former-spouse payments of Mr. Ellison’s [SBP.]” The trial court granted Plaintiff’s motion to join Defendant by order entered 9 June 2014. Defendant made a limited appearance “for the sole purpose of contesting personal jurisdiction and to quash the Order for Joinder dated June 9, 2014, as requested in my concurrently filed Motion to Quash.” Defendant’s notice of limited appearance and motion to quash for lack of personal jurisdiction were both filed on 27 June 2014. Defendant filed a motion to dismiss on 25 July 2014, based upon lack of personal jurisdiction. Plaintiff moved for summary judgment on 27 August 2014.

Plaintiff’s motion for summary judgment was heard on 2 October 2014. Summary judgment in favor of Plaintiff was entered by order filed on 2 October 2014, which stated “that [P]laintiff [was] entitled to judgment as requested in her motion, as a matter of law. [P]laintiff [was] the rightful beneficiary of the [SBP] annuity of [Mr. Ellison] as of the date of his death.” Defendant appeals.

I.

[1] In Defendant’s second argument, which we address first, she contends that the trial court erred in failing to dismiss the third-party complaint because the trial court lacked personal jurisdiction over Defendant. We disagree.

The trial court indicated that it believed it had *in rem* jurisdiction, and that it also obtained personal jurisdiction over Defendant because certain filings in the matter served to waive her objection to personal jurisdiction. We hold the trial court had jurisdiction *in rem*.

A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

(1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, *or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein*. This subdivision

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shall apply whether any such defendant is known or unknown.

N.C. Gen. Stat. § 1-75.8 (2013) (emphasis added). Defendant states in her brief: “The fact that there exists ‘personal property’ in North Carolina in which [Defendant] may have an interest, because of equitable distribution, is not alone sufficient to establish jurisdiction over [her] or her property.” Defendant does not contest that the interest in the SBP constitutes personal property located in North Carolina, so we do not address that issue.⁴ Defendant argues that the SBP issue was part of the equitable distribution action between Plaintiff and Mr. Ellison and, therefore, *in rem* jurisdiction could not apply. Defendant cites *Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988) for the proposition that:

In an equitable distribution action, the court is exercising jurisdiction over the interests of persons in property and not over a “status” of the parties. Exercise of this jurisdiction must meet the minimum contacts standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (defendant and forum State must have minimum contacts such that exercise of jurisdiction does not offend “‘traditional notions of fair play and substantial justice.’”). *Shaffer*, 433 U.S. at 212, 53 L.Ed.2d at 703.

Carroll, 88 N.C. App. at 455, 363 S.E.2d at 873-74. First, we do not recognize the present action as one for equitable distribution. It is unclear that SBP benefits are allocated pursuant to equitable distribution, but assuming *arguendo* that they are, this appeal is not from the equitable distribution order, but from an order determining the rightful beneficiary of the SBP. Nonetheless, the requirements of fair play and substantial justice must be satisfied before *in rem* jurisdiction may be exercised over Defendant. *Shaffer v. Heitner*, 433 U.S. 186, 212, 53 L. Ed. 2d 683 (1977) (“We therefore conclude that all assertions of state-court jurisdiction [including *in rem*] must be evaluated according to the standards set forth in *International Shoe* and its progeny.”); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

4. Because “our case law comports with the general understanding that *in rem* is but one type of personal jurisdiction[.]” Defendant can waive contested issues of *in rem* jurisdiction. *Coastland Corp. v. N.C. Wildlife Resources Comm’n*, 134 N.C. App. 343, 346, 517 S.E.2d 661, 663 (1999).

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We hold that the requirements of *International Shoe* and its progeny are satisfied in this instance. In *Lessard v. Lessard* this Court held the following:

The estate of the defendant's deceased daughter is personal property in this State and the relief demanded is to exclude the defendant from any interest in this property. No question has been raised as to service pursuant to Rule 4(k). This brings this action within the provisions of G.S. 1-75.8(1) and gives the court jurisdiction.

Lessard v. Lessard, 68 N.C. App. 760, 762, 316 S.E.2d 96, 97 (1984). The relief sought in the present action, like in *Lessard*, is to exclude Defendant from any interest in property located in North Carolina. When the subject matter of the controversy is property located in North Carolina, the constitutional requisites for jurisdiction will generally be met.

[W]e find the combination of the following factors sufficient to establish the requisite connection between the defendant and the forum: (1) The presence of the property in this State, especially in light of (2) the relationship between the property and the cause of action. As the *Shaffer* Court pointed out, the mere presence of property in the forum may "suggest the existence of other ties among the defendant, the State, and the litigation, . . ." *Shaffer v. Heitner*, *supra*, at 209, 97 S.Ct. at 2582, 53 L.Ed.2d at 701. *See also Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978). A significant tie develops when the property is *related* to the underlying controversy. In such a case, "it would be unusual for the State where the property is located not to have jurisdiction. . . . [T]he defendant's claim to property located in the State would normally indicate that [she] expected to benefit from the State's protection of [her] interest." *Shaffer v. Heitner*, *supra* at 209, 97 S.Ct. at 2581, 53 L.Ed.2d at 700. We think it indisputable that the property in the present case is related to and, indeed, is the source of the controversy between the plaintiff and the defendant.

Canterbury v. Hardwood Imports, 48 N.C. App. 90, 93-94, 268 S.E.2d 868, 870-71 (1980). It is indisputable that the property in this case was the source of the controversy before the trial court. We hold that the

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trial court properly exercised *in rem* jurisdiction. This argument is without merit.

II.

[2] In Defendant's first argument, she contends that the trial court erred in granting summary judgment because "there were genuine issues of material facts as to why Plaintiff failed to comply with the statutory deadlines for being designated beneficiary of Defendant's [SBP]." We disagree.

Defendant argues that because the trial court "conducted no inquiry, and received no evidence, as to why [Plaintiff] failed to comply with the statutory requirements and what the effect of that failure was[.]" there were issues of material fact concerning Plaintiff's failure, and summary judgment was improper. Defendant's focus on Plaintiff's failure to comply with the requirements of the United States Code ("the Code") related to perfecting her interest in the SBP is misplaced. Mr. Ellison was ordered to take the steps necessary to designate Plaintiff as the former spouse beneficiary of his SBP by order entered on 25 April 2002. Mr. Ellison failed to comply with the order, and did not take the required steps to designate Plaintiff as the former spouse beneficiary pursuant to 10 U.S.C. § 1448(b)(2). The Code allows a former spouse to obtain a "deemed election" as the SBP beneficiary in certain circumstances:

(A) Deemed election upon request by former spouse.

-- If a person described in paragraph (2) or (3) of section 1448(b) of this title is required (as described in subparagraph (B)) to elect under section 1448(b) of this title to provide an annuity to a former spouse and such person then fails or refuses to make such an election, such person shall be deemed to have made such an election if the Secretary concerned receives the following:

(i) Request from former spouse. -- A written request, in such manner as the Secretary shall prescribe, from the former spouse concerned requesting that such an election be deemed to have been made.

(ii) Copy of court order or other official statement.

-- Either --

(I) a copy of the court order, regular on its face, which requires such election or incorporates, ratifies, or approves the written agreement of such person; or

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(II) a statement from the clerk of the court (or other appropriate official) that such agreement has been filed with the court in accordance with applicable State law.

(B) Persons required to make election. – A person shall be considered for purposes of subparagraph (A) to be required to elect under section 1448(b) of this title to provide an annuity to a former spouse if —

(i) the person enters, incident to a proceeding of divorce, dissolution, or annulment, into a written agreement to make such an election and the agreement (I) has been incorporated in or ratified or approved by a court order, or (II) has been filed with the court of appropriate jurisdiction in accordance with applicable State law; or

(ii) the person is required by a court order to make such an election.

(C) Time limit for request by former spouse. – An election may not be deemed to have been made under subparagraph (A) in the case of any person unless the Secretary concerned receives a request from the former spouse of the person within one year of the date of the court order or filing involved.

10 U.S.C. § 1450(f)(3) (2014). Defendant is correct, and Plaintiff admits, that Plaintiff failed to follow the requirements to obtain a deemed election pursuant to 10 U.S.C. § 1450(f)(3) within one year of entry of the relevant order as required by 10 U.S.C. § 1450(f)(3)(C). Plaintiff was not seeking, and the trial court did not attempt, to order DFAS to elect Plaintiff as the former spouse beneficiary of the SBP in contradiction to the mandates of 10 U.S.C. § 1450(f)(3). The ultimate decision of whether Plaintiff is designated the beneficiary of the SBP continues to lie with DFAS.

Upon realizing that Mr. Ellison had not designated her as beneficiary of the SBP, and also realizing that she had failed to force a deemed election pursuant to 10 U.S.C. § 1450(f)(3) within one year of entry of the relevant order, Plaintiff applied to the Board to have her listed on the appropriate records as beneficiary. In its 9 June 2014 order joining Defendant in this action, the trial court found as fact:

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3. [Defendant] has an interest in the Survivor Benefit Plan annuity that was awarded to the Plaintiff in this action.

4. In order for the court-awarded SBP payments to be effectuated to [] Plaintiff, she must have either: a notarized affidavit from [Defendant] relinquishing her rights to the benefit in favor of [] Plaintiff, or an order declaring that [] Plaintiff is the rightful beneficiary of the benefit. The Board of Corrections for Military Records requires that [Defendant] be joined as [a] party before said order is entered.

5. [Defendant] has failed to provide an affidavit relinquishing her rights, and therefore an order must be entered that declares that [] Plaintiff is the rightful beneficiary.

Defendant has not challenged these findings of fact and, therefore, they are binding on appeal. *Langston v. Richardson*, 206 N.C. App. 216, 219, 696 S.E.2d 867, 870 (2010). The trial court was acting in response to a request from the Board to enter the order in this matter.

Further, contrary to Defendant's entire argument on appeal, the issue before the trial court, and now before us, has to do with the requirements of the Board, not the requirements of DFAS and the Code for obtaining a deemed election pursuant to 10 U.S.C. § 1450(f)(3). The reasons for Plaintiff's failure to act within the time limit set in 10 U.S.C. § 1450(f)(3)(C) were irrelevant to the trial court's ruling on summary judgment. Plaintiff will have to try and convince the Board that correction of the relevant records to include her as the former spouse beneficiary will "correct an error or remove an injustice[:]"

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. . . .

. . . .

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

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10 U.S.C. § 1552 (2014). “[The Board] is a civilian body within the military service, with broad-ranging authority . . . ‘to correct an error or remove an injustice’ in a military record, § 1552(a)(1).” *Clinton v. Goldsmith*, 526 U.S. 529, 538, 143 L. Ed. 2d 720 (1999); *see also Porter v. U.S.*, 163 F.3d 1304, 1324 (Fed. Cir. 1998) (“Section 1552 of title 10 conveys broad authority to the corrections boards regarding how they may exercise their statutory responsibilities, and contains no prescriptions on how they may fulfill their statutory charge.”).

The trial court’s ruling in this case simply answers the request the Board made to Plaintiff to obtain a court order, with Defendant joined as a party, determining the rightful beneficiary of the SBP so far as the trial court, which entered the original order designating Plaintiff as beneficiary, was concerned. Based upon the prior order of the trial court designating Plaintiff as beneficiary, and Defendant’s failure to participate in the action – and therefore failure to present any argument or evidence that she was the rightful beneficiary – we hold that there were no issues of material fact in this matter, and summary judgment was properly granted in favor of Plaintiff. We do not suggest the 2 October 2014 summary judgment mandates any particular resolution of Plaintiff’s application to the Board, or any further proceedings she may have with DFAS or any other federal entity.

AFFIRMED.

Judges ELMORE and GEER concur.

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THE ESTATE OF JERRY JACOBS, THE ESTATE OF ANN SHEPARD, THE ESTATE OF
CONNIE TINDALL, AND THE ESTATE OF JOE (WILLIAM DALLAS) WRIGHT, PLAINTIFFS

v.

STATE OF NORTH CAROLINA, DEFENDANT

No. COA15-146

Filed 4 August 2015

Statutes—compensation to persons erroneously convicted of felonies—posthumous pardons

Where four deceased persons received posthumous pardons of innocence and their estates filed petitions for compensation under Article 8, Section 48 of the General Statutes, the Court of Appeals affirmed the order of the Full Industrial Commission dismissing the estates' claims. The plain and unambiguous language of the statute does not allow compensation based on posthumous pardons of innocence.

Appeal by plaintiffs from order entered 24 July 2014 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 4 June 2015.

Ferguson Chambers & Sumter, P.A., by James E. Ferguson, II, and Irving Joyner, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorneys General Amar Majmundar and Olga E. Vysotskya de Brito, for the State.

INMAN, Judge.

In this case, we must determine whether the estates of four deceased persons may recover from the government compensation for the wrongful convictions of decedents who received posthumous pardons of innocence. Although both the State and this Court solemnly acknowledge the profound harm caused by the wrongful imprisonment of any person, we affirm the Full Commission's order dismissing plaintiffs' claims because the statute does not allow compensation based upon posthumous pardons of innocence.

Background

On 6 February 1971, amidst a series of violent confrontations between black and white citizens following the court-ordered desegregation of public schools, Mike's Grocery Store in Wilmington was

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firebombed, and the perpetrators attacked the police and fire rescue personnel who responded to the scene. In 1972, Jerry Jacobs, Anne Shepard, Connie Tindall, and Joe Wright, along with six others (collectively known as the “Wilmington Ten”), were arrested, convicted, and sentenced to various prison terms for these crimes.

In 1980, the United States Court of Appeals for the Fourth Circuit overturned their convictions, holding that the members of the Wilmington Ten had been denied the constitutional right to due process of law through gross prosecutorial misconduct and myriad legal errors at trial. *See Chavis v. State of N.C.*, 637 F.2d 213 (4th Cir. 1980). The principle witnesses for the State later recanted their testimony identifying the Wilmington Ten as the perpetrators.

On 31 December 2012, then-Governor Beverly Perdue issued pardons of innocence for all members of the Wilmington Ten, including posthumous pardons for the deceased Jacobs, Shepard, Tindall, and Wright, for what she deemed to be conduct “utterly incompatible with basic notions of fairness and with every ideal that North Carolina holds dear.” The estates of Jacobs, Shepard, Tindall, and Wright (“plaintiffs”) and the six living members of the Wilmington Ten all filed petitions with the North Carolina Industrial Commission on 25 February 2013 under Article 8, Chapter 48 of the North Carolina General Statutes (N.C. Gen. Stat. § 148-82 *et seq.*), for compensation due to persons erroneously convicted of felonies.

Although the State fully compensated the six members who were alive when their petitions were filed, it moved to dismiss plaintiffs’ claims on the ground that section 148-82 *et seq.* did not authorize estates to bring a statutory cause of action, especially where the decedents did not receive pardons of innocence prior to their deaths.

By order entered 28 October 2013, Deputy Commissioner J. Brad Donovan denied the State’s motions to dismiss, concluding that the legislative purpose for the enactment of section 148-82 *et seq.* was to allow remuneration for wrongful imprisonment, regardless of whether a pardon of innocence was issued posthumously.

The State appealed that order to the Full Commission, which reversed and dismissed plaintiffs’ claims. Writing for the Full Commission, Commissioner Linda Cheatham concluded that: (1) the language of section 148-82 *et seq.* was clear and unambiguous in its requirements, (2) plaintiffs did not meet the statutory conditions necessary to bring claims under section 148-82 *et seq.*, and (3) because claims under section 148-82 *et seq.* accrue by the issuance of a pardon of innocence, and neither

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Jacobs, Shepard, Tindall, nor Wright received a pardon of innocence prior to their respective deaths, no claims for remuneration survived to their personal representatives under N.C. Gen. Stat. § 28A-18-1 (2013). Plaintiffs filed timely notice of appeal from the Full Commission's order.

Plaintiffs' sole argument on appeal is that the Full Commission erred by dismissing their claims for compensation brought pursuant section 148-82 *et seq.* After careful review, we disagree.

I. Standard of Review

"We review an order of the Full Commission only to determine 'whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (quoting *Deese v. Champion Int'l. Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). Because the facts of this case are not in dispute, they are binding on appeal. *See Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007). The Full Commission's conclusions of law, including those related to questions of statutory interpretation, are reviewed *de novo*. *See In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009).

II. Analysis

Plaintiffs have no common law claims against the State arising from the decedents' wrongful convictions. *See Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534-36, 299 S.E.2d 618, 625-26 (1983). Their claims depend upon statutory rights created by section 148-82 *et seq.* Plaintiffs contend these statutes authorize their claims; the State contends that the plain meaning of the language of the statutes excludes plaintiffs' claims.

In matters of statutory construction, our primary task is to ensure that the purpose of the legislature is accomplished. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). Legislative purpose is first ascertained from the words of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute[.]" *In re Hamilton*, 220 N.C. App. 350, 352, 725 S.E.2d 393, 396 (2012). "Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* Finally, "statutes dealing with the same subject matter must be construed *in pari materia* and reconciled,

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if possible, so that effect may be given to each.” *Media, Inc. v. McDowell County*, 304 N.C. 427, 430–31, 284 S.E.2d 457, 461 (1981). Applying these canons of interpretation, as explained below, we conclude that the relief sought by plaintiffs conflicts with the plain meaning of the applicable statutes.

It is helpful to set out those provisions in full. Pursuant to section 148-82(a):

Any person who, having been convicted of a felony and having been imprisoned therefor in a State prison of this State, and who was thereafter or who shall hereafter be granted a pardon of innocence by the Governor upon the grounds that the crime with which the person was charged either was not committed at all or was not committed by that person, may as hereinafter provided present by petition a claim against the State for the pecuniary loss sustained by the person through his or her erroneous conviction and imprisonment, provided the petition is presented within five years of the granting of the pardon.

N.C. Gen. Stat. § 148-82(a) (2013).

N.C. Gen. Stat. § 148-83 (2013) then sets out the procedure for filing a petition:

Such petition shall be addressed to the Industrial Commission, and must include a full statement of the facts upon which the claim is based, verified in the manner provided for verifying complaints in civil actions, and it may be supported by affidavits substantiating such claim. Upon its presentation the Industrial Commission shall fix a time and a place for a hearing, and shall mail notice to the claimant, and shall notify the Attorney General, at least 15 days before the time fixed therefor.

Finally, N.C. Gen. Stat. § 148-84 (2013) describes the evidentiary, award, and compensation procedures:

(a) At the hearing the claimant may introduce evidence in the form of affidavits or testimony to support the claim, and the Attorney General may introduce counter affidavits or testimony in refutation. If the Industrial Commission finds from the evidence that the claimant received a pardon of innocence for the reason that the crime was not committed at all, received a pardon of innocence for the reason

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that the crime was not committed by the claimant, or that the claimant was determined to be innocent of all charges by a three-judge panel under G.S. 15A-1469 and also finds that the claimant was imprisoned and has been vindicated in connection with the alleged offense for which he or she was imprisoned, the Industrial Commission shall award to the claimant an amount equal to fifty thousand dollars (\$50,000) for each year or the pro rata amount for the portion of each year of the imprisonment actually served, including any time spent awaiting trial. However, (i) in no event shall the compensation, including the compensation provided in subsection (c) of this section, exceed a total amount of seven hundred fifty thousand dollars (\$750,000), and (ii) a claimant is not entitled to compensation for any portion of a prison sentence during which the claimant was also serving a concurrent sentence for conviction of a crime other than the one for which the pardon of innocence was granted.

...

(c) In addition to the compensation provided under subsection (a) of this section, the Industrial Commission shall determine the extent to which incarceration has deprived a claimant of educational or training opportunities and, based upon those findings, may award the following compensation for loss of life opportunities:

- (1) Job skills training for at least one year through an appropriate State program; and
- (2) Expenses for tuition and fees at any public North Carolina community college or constituent institution of The University of North Carolina for any degree or program of the claimant's choice that is available from one or more of the applicable institutions. . . .

The State contends that because section 148-82(a) explicitly waives the State's sovereign immunity from suit, its provisions must be strictly construed, *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627, and "everything should be excluded from the statute's operation which does not clearly come within the scope of the language used," *Izydore v. City of Durham (Durham Bd. of Adjustment)*, __ N.C. App. __, __, 746 S.E.2d 324, 326 (2013). On the other hand, plaintiffs argue that because section

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148-82 *et seq.* is remedial in nature, it must be liberally construed “in a manner which assures fulfilment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope.” *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979).

Both contentions have merit. This seems to be the rare case where precedent advises both a liberal and strict construction of the same statutes. But we need not attempt this task, nor must we choose which interpretative method prevails.

Even if we read section 148-82 *et seq.* liberally, as plaintiffs contend we should, we cannot conclude that plaintiffs’ claims “fairly fall[] within its intended scope.” *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251. The best indications of that intended scope “are the language of the statute or ordinance, the spirit of the act[,] and what the act seeks to accomplish.” *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (quotation marks omitted). These considerations support the Full Commission’s conclusion that the General Assembly did not intend for testamentary estates, like plaintiffs, to recover compensation under section 148-82 *et seq.*

First, the language of section 148-82 *et seq.* is plain and unambiguous in its requirements. Section 148-82(a) provides that “any *person*” who is convicted of a felony, imprisoned, and receives a pardon of innocence may “present by petition a claim against the State for the pecuniary loss sustained *by the person through his or her erroneous conviction and imprisonment*[.]” (Emphasis added.) N.C. Gen. Stat. § 12-3 (2013), titled “Rules for construction of statutes,” defines the word “person” as “bodies politic and corporate, as well as . . . individuals, unless the context clearly shows to the contrary.” Rather than “clearly show[ing]” that the word “person” in section 148-82(a) is meant to also include a testamentary estate, the statutory requirements that the “person” be convicted of a crime, imprisoned, and granted a pardon of innocence before petitioning the State for the pecuniary loss suffered “through his or her erroneous conviction and imprisonment” significantly bolsters the State’s argument that the word “person,” in the context of section 148-82(a), means the actual individual who was wrongfully incarcerated.

The legislature’s use in context of the word “claimant” in sections 148-83 and -84 further strengthens the State’s position. Particularly, the “claimant” is described in section 148-84(a) as having been “determined to be innocent”; “imprisoned”; and “vindicated in connection with the alleged offense for which he or she was imprisoned.” None of

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these descriptions applies to plaintiffs or could ever apply to a testamentary estate. In addition to pecuniary compensation, the Industrial Commission is required by section 148-84(c) to “determine the extent to which incarceration has deprived a claimant of educational or training opportunities,” and based on those findings, may award job skills training or expenses for fees and tuition at any public North Carolina institution of higher learning. Plaintiffs’ interpretation of this chapter would render section 148-84(c) either superfluous or nonsensical, as it would be impossible for the Industrial Commission to assess how an unconscious, inanimate legal entity like a testamentary estate was deprived “loss of life opportunities.” N.C. Gen. Stat. § 148-84(c).

“[T]he rule of liberal construction cannot be extended beyond the clearly expressed language of the act.” *Gilmore v. Hoke Cnty. Bd. of Educ.*, 222 N.C. 358, 366, 23 S.E.2d 292, 297 (1942). Thus, even under a liberal construction, we must give effect to each provision under section 148-82 *et seq.* where possible. Because plaintiffs’ interpretation runs counter to the plain and unambiguous language of these statutes, and would render certain portions unneeded, we must reject it. Accordingly, we affirm the Full Commission’s legal conclusion that section 148-82 *et seq.* did not authorize plaintiffs, as the testamentary estates of Jacobs, Shepard, Tindall, and Wright, to petition the State for compensation on their behalf.

We also affirm the Full Commission’s conclusion that plaintiffs may not avail themselves of N.C. Gen. Stat. § 28A-18-1 to assert claims under section 148-82 *et seq.* Section 28A-18-1 provides:

(a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, *existing in favor of or against such person*, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person’s estate.

(b) The following rights of action in favor of a decedent do not survive:

- (1) Causes of action for libel and for slander, except slander of title;
- (2) Causes of action for false imprisonment;
- (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

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(Emphasis added.) At oral argument, plaintiffs conceded that any claim under section 148-82 *et seq.* accrues only upon the issuance of a pardon of innocence. Because Jacobs, Shepard, Tindall, and Wright received no pardons of innocence during their lifetimes, no claims under section 148-82 *et seq.* existed to survive to their estates. *See, e.g., Carnahan v. Reed*, 53 N.C. App. 589, 592, 281 S.E.2d 408, 410 (1981) (holding that only causes of action which had accrued in favor of the decedent prior to his death could survive his death under section 28A-18-1).

We acknowledge plaintiffs' assertion that "[w]hen an innocent person has had his or her liberty and a portion of his or her life wrongfully taken, . . . [t]hat harm lives on after death – especially in the lives of affected loved ones." However, we are required by law to apply section 148-82 *et seq.* as it is written. *See Gilmore*, 222 N.C. at 366, 23 S.E.2d at 297 ("It is ours to construe the laws, and not to make them[.]"). These policy considerations are more appropriately raised with the legislative branch.

Conclusion

For the foregoing reasons, we affirm the order of the Full Commission dismissing plaintiffs' claims for compensation under section 148-82 *et seq.*

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

FOWLER v. N.C. DEP'T OF REVENUE

[242 N.C. App. 404 (2015)]

STEVE W. FOWLER AND ELIZABETH P. FOWLER, PETITIONERS

v.

NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. COA14-1302

Filed 4 August 2015

1. Taxation—income and gift taxes—law of residency—change of domicile

The trial court did not err by allegedly misapplying the law of residency for tax purposes when it concluded that petitioners satisfied their burden to prove a change of domicile to Florida on 20 January 2006. The Department of Revenue acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes.

2. Attorney Fees—taxation—claim substantially justified

The trial court did not err in a tax case by failing to grant petitioners' motion for attorney fees. The Department of Revenue's decision to pursue its claim against petitioners was substantially justified.

Appeal by respondent and cross-appeal by petitioners from order entered 6 August 2014 by Judge James L. Gale in Wake County Superior Court. Heard in the Court of Appeals 5 May 2015.

Attorney General Roy Cooper, by Assistant Attorney Generals Andrew O. Furuseth and Perry J. Pelaez, for the State.

Robinson Bradshaw & Hinson, P.A., by John R. Wester and Thomas P. Holderness, for petitioner-appellees and cross-appellants.

BRYANT, Judge.

As domicile is a question of fact, our review on appeal in this case concerns whether the trial court's findings of fact are supported by competent evidence, which in turn support the trial court's conclusions of law. Where the trial court's findings of fact were supported by competent evidence and supported its conclusions of law that petitioners had manifested an intent to permanently change their domicile from Raleigh, North Carolina to Naples, Florida on 20 January 2006, we affirm the trial court's order finding and concluding that the Department of Revenue acted beyond its legal authority in imposing 2006 and 2007 income and

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gift taxes. Where the trial court found and concluded that the Department of Revenue was, based on the evidence, substantially justified in pursuing its claim against petitioners, we affirm the trial court's subsequent denial of petitioners' motion for attorneys' fees.

On 22 December 2011, petitioners Steve W. Fowler and Elizabeth P. Fowler ("petitioners") filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH) against respondent North Carolina Department of Revenue (DOR). In the petition, petitioners contested the DOR's assessment of individual income tax for calendar years 2006 and 2007 and gift taxes assessed for calendar year 2006 on the grounds that they were not North Carolina residents and were not domiciled in North Carolina on or after 20 January 2006. The matter was heard 13-16 and 27-28 November 2012 before an Administrative Law Judge (the "ALJ").

In a decision entered 31 December 2012, the ALJ concluded that on 20 January 2006, petitioners abandoned their North Carolina residence and established their domicile in Florida. "The time Petitioners spent in North Carolina during the period of January 20, 2006 through the end of 2007 was for a temporary or transitory purpose" In accordance with its conclusions, the ALJ reversed and vacated the Department of Revenue's tax assessments against petitioners: "Petitioners were not residents of North Carolina after January 19, 2006 through the end of 2007 and therefore not subject to North Carolina income or gift tax for that period"

Pursuant to North Carolina General Statutes, section 150B-36, the ALJ's decision was reviewed by the DOR, the agency tasked with entering a final decision.¹

On 17 July 2014, the DOR entered a final agency decision. In pertinent part, the DOR identified the following as an issue:

[Whether petitioners met] their burden of proving a change in their North Carolina domicile by showing: (1) an actual abandonment of the first domicile, coupled with

1. In 2011, our General Assembly made significant changes to the Administrative Procedure Act codified within Chapter 150B of our General Statutes, including a repeal of N.C. Gen. Stat. § 150B-36. Pursuant to Session Law 2011-398, the repeal of N.C.G.S. § 150B-36 was effective 1 January 2012 and was applicable to contested cases commenced on or after that date. Act of July 25, 2011, Ch. 398, §§ 20, 63, 2011 N.C. Sess. 20. However, as this case was commenced on 22 December 2011, prior to the effective date of these statutory changes, N.C.G.S. § 150B-36 is applicable to this case.

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an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home?

In its conclusions of law, the DOR concluded that "Petitioners' domicile from January 20, 2006 through the end of 2007 was North Carolina." "[That] [u]nder N.C. Gen. Stat. §105-134.1(12), Petitioners were residents of North Carolina during 2006 and 2007 and were therefore subject to North Carolina income and gift taxes for those years." In accordance with its conclusions, the DOR's decision stated that "the [DOR] rejects the ALJ's Recommended Decision. The Notices of Final Determination dated October 27, 2011 issued to Petitioners by Respondent concerning individual income tax and gift tax assessments are sustained as to the tax, penalties, and interest, plus interest accruing, until paid in full."

Pursuant to General Statutes, sections 105-241.16 and 150B-43, petitioners filed a petition for judicial review of the final agency decision in Wake County Superior Court.

On 6 August 2014, after reviewing the record and hearing oral arguments, the Honorable James L. Gale, Special Superior Court Judge for Complex Business Cases, entered an order on the petition for judicial review of final decision in Wake County Superior Court. Judge Gale acknowledged that the question before the court was "whether Petitioners changed their domicile from North Carolina to Florida on or about January 20, 2006, exempting them from taxes arising from income received and gifts made in connection with the sale of [petitioner Steve] Fowler's majority interest in his company, which closed on February 3, 2006." Furthermore, the court noted respondent DOR's acknowledgement "that Petitioners ultimately intended to change their domicile to Florida at some point in the future, but that they had no intent to and did not abandon their domicile in North Carolina at a time that avoids the taxes in question."

The Superior Court concluded that "[the petitioners] intended to change and did change their domicile from North Carolina to Florida effective as of January 20, 2006, effecting an intent that preceded that date." "Respondent acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes, together with penalties and interest on the Petitioners." In accordance with these conclusions, the court reversed the final agency decision of the DOR. The trial court then denied petitioners' request for attorneys' fees. DOR appeals. Petitioners cross-appeal on the denial of attorneys' fees.

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On appeal, DOR argues that (I) the trial court misapplied the law of residency for tax purposes and (II) petitioners failed to present substantial evidence of abandonment of their North Carolina domicile. On cross-appeal, petitioners argue that (III) the record displayed no genuine foundation for the DOR to press its claim against petitioners and (IV) there were no special circumstances making an award of attorneys' fees unjust.

DOR's Appeal

[1] The DOR argues that the trial court erred by misapplying the law of residency for tax purposes. We disagree.

"[General Statutes, Chapter 150B] establishes a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a) (2013). "The contested case provisions of [Chapter 150B] apply to all agencies and all proceedings" *Id.* § 150B-1(e). A "contested case" is "an administrative proceeding pursuant to [Chapter 150B] to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." *Id.* § 150B-2(2).

[A] final decision in a contested case shall be made by the agency in writing after review of the official record . . . and shall include findings of fact and conclusions of law. The agency shall adopt each finding of fact contained in the administrative law judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. . . .

. . .

(b3) . . . [T]he agency shall adopt the decision of the administrative law judge unless the agency demonstrates that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record. If the agency does not adopt the administrative law judge's decision as its final decision, the agency shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency.

N.C. Gen. Stat. § 150B-36(b), (b3) (2011).

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If, as here, petitioners seek judicial review of an agency decision that did not adopt the decision of the ALJ, the trial court's standard of review is governed by the parameters set forth in General Statutes, section 150B-51:

[i]n reviewing a final decision in a contested case in which an administrative law judge made a decision . . . and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

Id. § 150B-51(c) (2011).²

Usually,

[w]hen the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court. It is the traditional function of appellate courts to review the decisions of lower tribunals for errors of law or procedure, while generally deferring to the latter's unchallenged superiority to act as finders of fact.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004) (citations and quotation omitted). However, section 150B-51(c) "requires courts to engage in independent fact-finding

2. "This subsection requires courts to engage in independent fact-finding but only when the agency rejects the ALJ's decision. It does not redefine the 'de novo' standard governing judicial review over questions of law." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 663, 599 S.E.2d 888, 897 (2004) (citations omitted).

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... when the agency rejects the ALJ's decision." *Id.* at 663, 599 S.E.2d at 897 (citation omitted). When a trial court's decision is appealed to this Court, "[t]he scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2011); *see also Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 22, 590 S.E.2d 8, 14 (2004) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if contradictory evidence may exist. The substantial evidence test is a deferential standard of review." (citations and quotations omitted)).

This Court's scope of appellate review of a superior court order regarding a final agency decision is limited to examination of the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 162 N.C. App. 467, 475-76, 591 S.E.2d 549, 555 (2004) (citations and quotation omitted), *overruled on other grounds by Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

The DOR contends the trial court misapplied the law for residency for tax purposes in concluding that petitioners satisfied their burden to prove a change of domicile on 20 January 2006. Specifically, the DOR argues that the question of domicile is a question of law. However, it is well-established by our Courts that domicile is a question of fact. *See State v. Williams*, 224 N.C. 183, 191, 29 S.E.2d 744, 749-50 (1944) ("Domicile is a matter of fact and intention. In ordinary acceptance, it is the place where one lives or has his home. Two circumstances must concur in order to establish a domicile: first, residence, and secondly, the intention to make it a home, or to live there permanently, or, as some of the cases put it, indefinitely. To effect a change of domicile, therefore, the first domicile must be abandoned with no intention of returning to it, and actual residence taken up in another place coupled with the intention to remain there permanently or indefinitely." (citations omitted)); *see also In re Estate of Severt*, 194 N.C. App. 508, 515, 669 S.E.2d 886, 891 (2008) ("Domicile is . . . a question of fact.") (quoting *In re Will of Marks*, 259 N.C. 326, 331, 130 S.E.2d 673, 676 (1963) (discussing in which state a testator's will could be properly probated, noting: "Domicile is, however,

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a question of fact. Different courts may reach different conclusions with respect to this factual question.”)). As such, we review the trial court’s order under the substantial evidence test. *Cape Med. Transp., Inc.*, 162 N.C. App. at 22, 590 S.E.2d at 14 (citation omitted).

“The general purpose of this Part [of our General Statutes designated Individual Income Tax] is to impose a tax for the use of the State government upon the taxable income collectible annually: (1) [o]f every resident of this State.” N.C. Gen. Stat. § 105-134(1) (2006). Pursuant to General Statutes, section 105-134.1, a “resident” is defined as

[a]n individual who is domiciled in this State at any time during the taxable year or who resides in this State during the taxable year for other than a temporary or transitory purpose. . . . A resident who removes from the State during a taxable year is considered a resident until he has both established a definite domicile elsewhere and abandoned any domicile in this State.

Id. § 105-134.1(12). “Although a person may have more than one residence, he can only have one domicile. Domicile is a question of fact to be determined by the finder of fact.” *Atassi v. Atassi*, 117 N.C. App. 506, 511, 451 S.E.2d 371, 374 (1995) (citations omitted).

Both petitioners and the DOR refer to *Farnsworth v. Jones*, 114 N.C. App. 182, 441 S.E.2d 597 (1994), as setting forth the general principles for the determination of whether a person has changed domicile. In *Farnsworth*, this Court addressed whether the plaintiff was a resident of a municipality such that the plaintiff was eligible as a candidate for election to a municipal office. In its discussion, the *Farnsworth* Court defined residence, as opposed to domicile, and applied a three-part test to differentiate these terms.

Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person’s actual place of abode, whether permanent or temporary. Domicile denotes one’s permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return. . . . [I]t is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave.

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. . . Where someone retains his original home with all its incidental privileges and rights, there is no change in domicile.

Once an individual acquires a domicile, it is presumed to continue until a new domicile is established. [T]he burden of proof rests upon the person who alleges a change. We apply a three-part test to differentiate between a residence and a domicile. To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home. Although a person's testimony regarding his or her intent regarding the acquisition of a new domicile is competent evidence, it is not conclusive. We must consider the evidence of all the surrounding circumstances and the conduct of the person in determining whether he or she has effectuated a change in domicile.

Id. at 186-87, 441 S.E.2d at 600-01 (citations and quotation omitted).

We also note that the North Carolina Administrative Procedure Act includes a list of non-exclusive factors to be considered by the agency (here, DOR) in determining the legal residence or domicile of an individual for income tax purposes:

- (1) Place of birth of the taxpayer, the taxpayer's spouse, and the taxpayer's children.
- (2) Permanent residence of the taxpayer's parents.
- (3) Family connections and close friends.
- (4) Address used for federal tax returns, military purposes, passports, driver's license, vehicle registrations, insurance policies, professional licenses or certificates, subscriptions for newspapers, magazines, and other publications, and monthly statements for credit cards, utilities, bank accounts, loans, insurance, or any other bill or item that requires a response.
- (5) Civic ties, such as church membership, club membership, or lodge membership.
- (6) Professional ties, such as licensure by a licensing agency or membership in a business association.

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- (7) Payment of state income taxes.
- (8) Place of employment or, if self-employed, place where business is conducted.
- (9) Location of healthcare providers, such as doctors, dentists, veterinarians, and pharmacists.
- (10) Voter registration and ballots cast, whether in person or by absentee ballot.
- (11) Occasional visits or spending one's leave "at home" if a member of the armed services.
- (12) Ownership of a home, insuring a home as a primary residence, or deferring gain on the sale of a home as a primary residence.
- (13) Location of pets.
- (14) Attendance of the taxpayer or the taxpayer's children at State supported colleges or universities on a basis of residence—taking advantage of lower tuition fees.
- (15) Location of activities for everyday "hometown" living, such as grocery shopping, haircuts, video rentals, dry cleaning, fueling vehicles, and automated banking transactions.
- (16) Utility usage, including electricity, gas, telecommunications, and cable television.

17 N.C.A.C. 06B.3901 (2011). These factors were considered by the ALJ as well as the DOR in their respective evaluations of petitioners' case.

Here, the facts underlying the trial court's determination that petitioners changed their domicile from North Carolina to Florida on 20 January 2006 are not substantially disputed. In its order, the trial court made the following findings of fact:

{25} Petitioners are a married couple who were domiciled in North Carolina at least until January 19, 2006, and for their entire lives before that date. They filed North Carolina tax returns for the 2005 tax year and for each year prior to 2005, but have asserted that they were non-residents during the 2006 and 2007 tax years.

...

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B. Events prior to January 20, 2006

{27} In 1984, Mr. Fowler founded Commercial Grading, Inc. ("Commercial Grading"), a North Carolina company, which did business as "Fowler Contracting." Mr. Fowler devoted his time and effort to building Commercial Grading into a highly successful enterprise. He held the controlling majority interest in the company. Mrs. Fowler also worked at the company and dedicated substantial effort on its behalf.

{28} Petitioners began considering Florida as a potential retirement location as early as the 1990's.

. . .

{30} Over several years, Petitioners visited numerous cities in Florida in search of real estate. In 2002, they purchased a three-bedroom, 3,400 square-foot house in Naples (the "Tiburon House") for approximately \$1.6 million. In 2003, in connection with the move to their new Old Stage Road residence [in Raleigh, NC], Petitioners moved furniture to the Tiburon House, including some family heirlooms and valued furniture. At this time, the Tiburon House was Petitioners' secondary residence, which they did not consider their true, fixed permanent home and principal establishment to which they intended to return when absent.

{31} In 2004, Mr. Fowler was diagnosed with kidney cancer and underwent surgery to remove his kidney. Petitioners accelerated their efforts to sell Commercial Grading and retire to Florida.

{32} In January 2005, Petitioners formed Fowler Aviation, Inc., a Florida company, to sell a new type of private jet. They invested \$1.775 million in the venture, but the money was fully refunded in 2006 when the FAA would not certify the jet for production and sale.

{33} In early 2005, Petitioners engaged an investment-banking firm to solicit buyers for Commercial Grading. . . . In October 2005, Mr. Fowler signed a preliminary letter of intent ("Letter of Intent") with a private equity firm, Long Point Capital, to sell a majority of his shares in Commercial Grading. . . . Mr. Fowler was further expected to remain the company's President, and Mrs. Fowler was

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also expected to remain with the company for a period after the sale.

{34} After signing the Letter of Intent, Petitioners told various other acquaintances in both Florida and North Carolina of their intent to move to Florida.

{35} Also, shortly after signing this Letter of Intent, Petitioners contracted to buy a four-bedroom, 9,300 square-foot house in Naples, Florida (“the Quail West House”), while retaining the Tiburon House. They closed on their purchase in August 2006, but later sold the Quail West House in April 2009 without having lived in it.

{36} In late 2005, Petitioners consulted their accountant, Graham Clements, to determine how to accomplish a change of domicile to Florida. . . . Mr. Clements advised Petitioners to change their domicile to Florida after January 1, 2006, but before the close of the sale to Long Point, which would be a taxable event. To effect the transfer, Mr. Clements advised Petitioners to own a home in Florida, hire a Florida attorney, file a Declaration of Domicile in Florida, spend at least 183 days in Florida, and take some “official action,” such as changing their driver’s licenses and registering to vote.

{37} Also in late 2005, Mr. Fowler sought assistance from William Graef, a friend who owned an aviation company, for the purpose of buying, maintaining, and storing a private airplane. Petitioners contracted in early 2006 to purchase a plane from Mr. Graef for approximately \$19.2 million. Petitioners and Mr. Graef unsuccessfully attempted to locate suitable hangar space with necessary services in Naples. They continued to charter private planes from Raleigh until the plane was delivered in Raleigh on October 2007, where it was registered and then stored. During this period, the predominant portion of the Fowlers’ various travels were on flights originating in and returning to Raleigh.

{38} Lynnwood Mallard was Petitioners’ counsel in connection with the sale of Commercial Grading. Mr. Mallard advised Mr. Fowler that Long Point would require Petitioners to continue working for Commercial Grading after the sale. The length and nature of the requirement

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became a significant point in negotiations for a sales agreement. Mr. Mallard obtained assurances that Mr. Fowler's work need not necessarily be on-site in North Carolina.

{39} On January 19, 2006, Petitioners signed the binding Securities Purchase Agreement for the sale of the majority interest in Commercial Grading. This event did not trigger taxes arising from the actual sale, which was set to occur in early February.

C. Efforts on January 20, 2006

{40} On January 20, 2006, the Fowlers left for Naples, Florida, on a chartered plane for the purpose of taking "official action" to evidence their change of domicile. They tried but could not complete certain efforts on this trip because they left certain necessary papers in North Carolina. At the driver's license office, Petitioners presented their North Carolina licenses and asked for Florida driver's licenses, but were denied for lack of additional identification. They attempted but were unable to register to vote for the same reason. At this time, Petitioners had one of their several automobiles in Florida. They registered that single car in Florida, but signed the registration form as non-residents, listing their North Carolina address. Petitioners also unsuccessfully attempted to obtain a post office box and register their dog on January 20, 2006.

{41} Petitioners stayed at the Tiburon House on this trip, which they contend had then become their true, fixed permanent home and principal establishment to which they intended to return when absent.

{42} On or about January 22, 2006, Petitioners returned to their Old Stage Road home, which they contend had then become their secondary home where they would reside on a temporary and transitory basis until and for the purpose of completing their ongoing obligations assumed under the sales transaction.

D. Events Following the Sale of Commercial Grading, Including Continuing North Carolina Ties

{43} On February 3, 2006, Petitioners closed the sale of their majority interest in Commercial Grading to Long Point Capital for \$106 million. . . .

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{44} Mr. Fowler signed an Employment Agreement with Long Point on February 3, 2006, pursuant to which he was employed as President for a term of three years and responsible for managing day-to-day operations of the company. He remained employed until February 3, 2009. Mrs. Fowler also signed a three-year Employment Agreement on February 3, 2006, as Assistant Secretary, and remained employed until February 3, 2009. Efforts to hire a president to replace Mr. Fowler and assume his responsibilities earlier than his contract's expiration were unsuccessful.

...

{46} Mrs. Fowler also made significant charitable contributions [to her late father's church] in North Carolina after February 3, 2006. . . .

{47} Petitioners returned to Florida on March 10, 2006, and successfully completed the matters that they were unable to complete on their January 20, 2006, trip. They signed and filed a Declaration of Domicile in Florida. They obtained a Naples post office box and Florida driver's licenses, and they registered to vote. They have since voted in person in Florida elections. In August 2006, Petitioners advised the Wake County Board of Elections to remove them from the voting rolls of Wake County. They have not voted in North Carolina since January 20, 2006.

{48} In spring 2006, Petitioners hired Cooper Pulliam, an investment advisor in Atlanta, Georgia, to buy municipal bonds. Based on his understanding that Petitioners were Florida residents, Mr. Pulliam purchased a portfolio of municipal bonds from across the country. . . .

{49} Petitioners traveled extensively after the sale, often to locations outside of either North Carolina or Florida. They spent substantial time in Myrtle Beach, South Carolina. Counting days, the Fowlers spent the most days in North Carolina in 2006 and 2007. Mr. Fowler testified that they did so because his duties as President required "face-to-face" meetings and "riding the jobs." In 2006, Mr. Fowler spent 162 and 51 days in North Carolina and Florida respectively. In 2007 he spent 168 and 27 days in North Carolina and Florida respectively. In 2006, Mrs. Fowler spent 173

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and 47 days in North Carolina and Florida respectively. In 2007, she spent 180 and 27 days in North Carolina and Florida respectively. Neither Mr. Fowler nor Mrs. Fowler spent 183 days in North Carolina in either 2006 or 2007.

{50} When in Raleigh, Petitioners stayed at their Old Stage Road home. They returned to their home in Naples on several occasions throughout 2006 and 2007.

{51} Petitioners did not list their Old Stage Road house for sale in 2006. . . [due to] the declining real estate market. Ultimately, Petitioners listed the house on December 1, 2010, at \$7.9 million.

{52} Petitioners used their Florida address on their North Carolina Individual Income Tax Returns filed in April 2006 and thereafter. Mrs. Fowler continued to use her North Carolina address on her Privilege License Tax Returns from 2006 through 2010, although the checks Mrs. Fowler used to pay the taxes due on her Privilege License Tax Returns displayed her Florida address. Mrs. Fowler retained her North Carolina real estate license and received referral fees for properties in South Carolina and Florida, but never for property sold in North Carolina. During 2006 and 2007, Mrs. Fowler completed her continuing education requirements in North Carolina. Mrs. Fowler did not obtain a Florida real estate license.

{53} Throughout 2006, the Fowlers changed their address from North Carolina to Florida with various businesses. However, throughout 2006 and 2007, they also continued to use the Old Stage Road address in Raleigh for certain correspondence and billing, and on K-1s, 1099s, bills, and bank statements.

{54} In 2006 and 2007, Mrs. Fowler went to church in both Naples and Raleigh. While she indicates that she contributed to churches in Naples, the record reflects much more significant giving in North Carolina during this period. . . . During 2006 and 2007, Petitioners further donated to numerous other North Carolina charitable organizations.

{55} In 2006 and 2007, Petitioners were members of the Tiburon Club and the Quail West Club in Florida, but of no club in North Carolina. . . .

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{56} In 2006, Mr. Fowler used doctors in North Carolina and Massachusetts. In 2007, he used doctors in North Carolina, Massachusetts, and Florida. The majority of Petitioners' 2006 and 2007 medical expenses were for treatment at a Massachusetts facility associated with the Cleveland Clinic.

{57} In 2006 and 2007, the Fowlers did everyday "home-town" activities wherever they were.

{58} In 2006, the Fowlers hired Florida counsel to create their first estate plan. In 2006 and 2007, Mr. Fowler obtained legal services from at least two North Carolina firms.

{59} In 2006 and 2007, Mr. Fowler served as the registered agent for several North Carolina business entities. . . . Mr. Fowler used his Florida address when organizing these companies.

{60} Petitioners bought a homeowners insurance policy for their home at 7801 Old Stage Road in Raleigh for the period of July 31, 2006, through July 31, 2007. The policy included the stipulation that "The described dwelling is not seasonal or secondary." . . . They did not insure their Florida property.

{61} The Fowlers donated to candidates running for office in North Carolina but did not contribute to Florida candidates. Mr. Fowler testified that each contribution was tied to candidates whose efforts benefitted business holdings.

The trial court then made the following conclusions of law³:

{70} Based on the above findings of fact, applying the governing legal principles, the court makes the following conclusions of law:

3. We note that the trial court mischaracterized some of its conclusions of law as findings of fact. However, this mischaracterization does not affect our review of the trial court's order. See *Hastings v. E. Carolina Pathology Assocs.*, No. COA04-994, 2005 WL 194884, at *3 (N.C. App. August, 16 2005) (unpublished) ("We reject [the] . . . characterization of the findings stated above as 'conclusions of law.' The Commission was not applying any legal standard to the evidence, but rather was evaluating the credibility of each physician's testimony under the circumstances. Accordingly, we now determine whether competent evidence exists to support these challenged findings.").

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{71} The Fowlers can have but one domicile. The Fowlers intended to change and did change their domicile from North Carolina to Florida effective as of January 20, 2006, effecting an intent that preceded that date.

{72} The Fowlers took adequate voluntary and positive actions in Florida on January 20, 2006 to establish their new domicile. These intentional, voluntary, and positive actions were adequate, even though the Fowlers did not complete certain activities until the return trip on March 10, 2006.

{73} On January 20, 2006, the Fowlers were present in Florida and intended to return there whenever absent thereafter. They owned and lived in the Tiberon House, a true, fixed permanent home and principal establishment to which they intended to return when absent.

{74} On and after January 20, 2006, the Fowlers were North Carolina non-residents. On that date, they intended their home at Old Stage Road in Raleigh, North Carolina, to be their secondary home that they would no longer maintain as their permanent home. After January 20, 2006, they used this property as a temporary residence for the completion of temporary and transitory contractual obligations undertaken in connection with the sale of the majority interest in Commercial Grading.

{75} On January 20, 2006, the Fowlers intended to abandon and did abandon North Carolina as their domicile.

{76} The Fowlers were not required to remove all of their possessions and sever all ties with North Carolina to effect a change in domicile. *Hall [v. Wake Cnty. Bd. of Elections]*, 280 N.C. [600,] 610-11, 187 S.E.2d [52,] 58.

{77} The Fowlers' intent to change domicile was not improper or rendered ineffective because the change was timed to maximize tax savings. Additionally, Mr. Fowler's unexpected medical condition accelerated the need to carry out a preexisting future intent for this change in domicile.

{78} Conversely, the Fowlers were not in Florida for a temporary or transitory purpose on and after January 20, 2006.

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{79} Continued investments through the North Carolina Wachovia account, charitable and political contributions, maintaining personal property in North Carolina, and various other actions concerning North Carolina do not negate that Petitioners abandoned North Carolina as a domicile.

{80} This case must be considered on its own unique facts. Facts here are distinguishable from cases where activities in the claimed new domicile were temporary or transitory. *See, e.g., Farnsworth*, 114 N.C. App. at 188, 441 S.E.2d at 602. The decision in *Mauer v. Commissioner of Revenue*, 829 N.W.2d 59, 75 (Minn. 2013), is unpersuasive because its facts are distinct.

{81} Any attempt to weigh the non-exclusive list of sixteen (16) factors in 17 N.C. Admin. Code 06B.3901(b) does not lead to a necessary finding that the Fowlers failed to abandon their domicile in North Carolina on January 20, 2006. Under the facts of this case, four of the sixteen factors favor a North Carolina domicile (1, 3, 6 & 9), one favors a Florida domicile (10), six are neutral (4, 5, 12, 13, 15 & 16), two are beyond Petitioners' control (2 & 8), and three are inapplicable (7, 11, & 14).

{82} The Fowlers have satisfied the three-part test for change of domicile established in *Farnsworth*.

{83} Petitioners have satisfied their burden to prove a change of domicile to Florida as of January 20, 2006.

Given the advice of their accountant regarding the establishment of a new domicile prior to the sale of Commercial Grading, a binding Securities Purchase Agreement to sell Commercial Grading signed 19 January 2006 scheduling a sale in early February 2006, and petitioners' actions on 20 January 2006 in Naples, Florida (attempting to acquire Florida driver's licenses, attempting to register to vote, attempting to acquire a post-office box, attempting to register their dog, and registering one vehicle, albeit as non-residents), it is clear that petitioners were acting based on their intent to change their domicile to Florida. However, the question before us is whether the trial court erred in ruling that petitioners effected a change of domicile on 20 January 2006. We hold that, based on the substantial evidence before the trial court which supports its findings of fact and subsequent conclusions of law, the court did not err in its ruling.

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We emphasize our scope of review is to determine, first, whether the trial court exercised the appropriate scope of review and, secondly, to determine whether it did so properly. Pursuant to N.C.G.S. § 150B-36, the trial court conducted a *de novo* review of the record and made independent findings of fact and conclusions of law. The trial court's findings of fact and, in turn, its conclusions of law, were supported by evidence in the record, even though the record contained evidence that could have led to contrary findings of fact and conclusions of law. Therefore, in accordance with our standard of review, and upon our examination of the order of the trial court, we find no error in the conclusion that on 20 January 2006, petitioners abandoned their domicile in Raleigh with the intention of making the Tiburon House in Naples, Florida, their permanent home, thereby effecting a change in domicile. *See Atassi*, 117 N.C. App. at 511, 451 S.E.2d at 374 (“[A] person may have more than one residence [but] can only have one domicile.” (citation omitted)). As there was sufficient evidence to support the trial court's findings of fact and conclusions of law that petitioners effected a change in domicile to Florida, DOR's additional argument that petitioners failed to meet their burden of demonstrating a change in domicile need not be further addressed. Therefore, we affirm the order of the trial court concluding that DOR acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes.

Petitioners' Cross-Appeal

[2] On cross-appeal, petitioners contend the trial court erred in failing to grant their motion for attorneys' fees. We disagree.

Pursuant to North Carolina General Statutes, chapter 6-19.1,

(a) In any civil action, . . . unless the prevailing party is the State, *the court may, in its discretion*, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

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N.C. Gen. Stat. § 6-19.1(a) (2014) (emphasis added). “However, if the trial court determines that the State agency did *not* act ‘without substantial justification,’ *or* that some special circumstances *do* exist which make an award of attorney’s fees unjust, then the trial court lacks discretion, and *cannot* award attorney’s fees.” *High Rock Lake Partners, LLC v. N.C. DOT*, __ N.C. App. __, __, 760 S.E.2d 750, 753 (2014).

In its conclusions of law, the trial court noted that although DOR “acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes” on petitioners, DOR acted with substantial justification in bringing its claim against petitioners:

{86} Petitioners are not entitled to attorneys’ fees.

{87} The Department correctly recognized that a change of domicile must be determined from the totality of circumstances, and that a taxpayer claiming a change in domicile has the burden of proving such change by demonstrating both intent to establish a new domicile and to abandon the old one. The court, after a thorough and careful review of the record, has accepted and found that the Fowlers’ presence in North Carolina after January 20, 2006, was as non-residents for temporary and transitory purposes. However, the record provided the Department with a substantial and reasonable basis to pursue its position that the Fowlers had not actually abandoned their domicile in North Carolina in 2006 or 2007.

{88} The Department had substantial justification in pressing its claim against Petitioners.

{89} The Department did not act without justification by failing to “score” each of the various factors leading to its decision.

{90} An award of attorneys’ fees against Respondent on the facts of this case would be unjust.

Petitioners contend the trial court erred as a matter of law in ruling that DOR “was substantially justified and that an award of attorney’s fees would be unjust.” Petitioners’ argument is without merit.

We agree with the trial court’s conclusion of law that DOR’s decision to pursue its claim against petitioners was substantially justified, as while petitioners presented evidence that they intended to, and eventually did, fully move themselves and their belongings to Florida, there

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was also evidence to support DOR's contention that petitioners did not effectuate a change in domicile to Florida until sometime after 2007. Indeed, the trial court's order reflects the often conflicting evidence presented as to whether petitioners had in fact changed their domicile on 20 January 2006, including, *inter alia*, findings of fact that petitioners registered one of their cars in Florida on 20 January 2006 but did so by registering as non-residents; petitioners continued to maintain their Raleigh residence and insured it as a primary, rather than secondary, home; petitioners "made significant financial contributions in North Carolina after February 3, 2006" to churches and political candidates; petitioners continued to maintain North Carolina-based banking accounts; petitioners used their Raleigh residence's address for "certain correspondence and billing"; and Mr. Fowler served as a registered agent for several North Carolina-based businesses in 2007. As this evidence and findings of fact can be said to support DOR's contention that petitioners did not change domicile on 20 January 2006, the trial court's ruling that DOR was substantially justified in pursuing its claim against petitioners and, therefore, petitioners' motion for attorneys' fees should be denied, was proper. *See id.*

Accordingly, we affirm the order of the trial court concluding that DOR acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes against petitioners and denying petitioners' motion for attorneys' fees.

AFFIRMED.

Judges DAVIS and INMAN concur.

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[242 N.C. App. 424 (2015)]

LEROY GENTRY, ADMINISTRATOR OF THE ESTATE OF
CLIFTON NAKAYA LEROY GENTRY, PLAINTIFF

v.

N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES/
CHERRY HOSPITAL, DEFENDANT

No. COA15-11

Filed 4 August 2015

Civil Procedure—two dismissal rule—same transaction or occurrence against different defendants

The Industrial Commission did not err in a case arising from an incident where decedent used a deputy's gun at a hospital to shoot a hospital employee and himself, by granting defendant North Carolina Department of Health and Human Services' (N.C. DHHS) motion for summary judgment based on the "two dismissal" rule under N.C.G.S. § 1A-1, Rule 41(a)(1). The rule can apply to actions with claims arising from the same transaction or occurrence against different defendants. The three actions, including wrongful death and two state tort claims, alleged damages based on the negligent conduct of numerous employees of N.C. DHHS stemming from the 22 July 2005 incident.

Appeal by plaintiff from order entered 29 August 2014 by Commissioner Tammy Nance in the North Carolina Industrial Commission. Heard in the Court of Appeals 20 May 2015.

NARRON & HOLDFORD, P.A., by Ben L. Eagles, for plaintiff,

Attorney General Roy Cooper, by Assistant Attorney General Alesia M. Balshakova, for the State.

ELMORE, Judge.

Plaintiff appeals from an order entered 29 August 2014 by the North Carolina Industrial Commission (the Full Commission) granting defendant's motion for summary judgment. After careful consideration, we hold the Full Commission's decision was free from error.

I. Background

The unchallenged and binding facts of this case as found by the Full Commission are the following: On 20 July 2007, Leroy Gentry (plaintiff),

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administrator of the estate of Clifton Gentry (the decedent), filed a complaint (the first action) in Wayne County Superior Court against defendants “Arturo Pizano, Individually and as Onslow County Deputy Sheriff, North Carolina Department of Health and Human Services, Sheriff Ed Brown, Onslow Co., and Jim Osberg[.]” The first action alleged a cause of action for negligence (wrongful death) against the named defendants arising from an incident on 22 July 2005. On that date, according to the first action, Deputy Sheriff Arturo Pizano transported the decedent to Cherry Hospital for the purpose of having the decedent involuntarily committed. When Deputy Pizano brought the decedent inside the hospital, the decedent grabbed a firearm from Deputy Pizano’s person and used the firearm to shoot a hospital employee. The decedent subsequently shot himself with the firearm, resulting in his death. On 25 October 2007, plaintiff filed a notice of voluntary dismissal without prejudice of the first action pursuant to North Carolina Civil Procedure Rule 41(a)(1).

On 20 July 2007, plaintiff also filed a state tort claim (the second action) with the North Carolina Industrial Commission, captioned “Leroy Gentry, Administrator for the Estate of Clifton Nakaya Larone Gentry (Onslow County Estate 07 E 372) v. North Carolina Department of Health and Human Services, Cherry Hospital[.]” Plaintiff alleged that the North Carolina Department of Health and Human Services (NCDHHS), Cherry Hospital (defendant) was liable due to the alleged negligent acts of “Mark Van Sciver and directors and administrators of Cherry Hospital and Dr. Jim Osberg, Hospital Director,” based on the same 22 July 2005 incident. Plaintiff filed a voluntary dismissal of the second action without prejudice on 2 July 2010.

Plaintiff filed another state tort claim (the third action) with the North Carolina Industrial Commission on 1 July 2011 alleging that defendant NCDHHS/Cherry Hospital was liable due to the alleged negligent conduct of “William Denning & Director of Cherry Hospital, Jim Osberg”¹ stemming from the same 22 July 2005 incident. Defendant, in relevant part, filed a motion for summary judgment arguing that plaintiff’s third action should be dismissed with prejudice in light of the “two dismissal” rule expressed in North Carolina Civil Procedure Rule 41(a)(1).

1. We note that plaintiff’s first affidavit filed with the Industrial Commission refers to “William Denning” and “Jim Osberg” while plaintiff’s second affidavit refers to “William Dennings” and “Jim Ogden.” It appears to the Court that “William Denning” and “Jim Osberg” are the intended individuals, and all references throughout this opinion are listed as such.

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On 17 January 2014, Deputy Commissioner Stephen T. Gheen filed a decision and order granting defendant's motion for summary judgment and dismissing the third action with prejudice. Plaintiff appealed the Deputy Commissioner's order to the Full Commission. In an order entered 29 August 2014, the Full Commission affirmed the Deputy Commissioner's decision, granting defendant's motion for summary judgment based on the "two dismissal" rule and dismissing plaintiff's third action with prejudice.

II. Analysis

a.) Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted). "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citation omitted).

b.) Two Dismissal Rule

Plaintiff argues the trial court erred by granting defendant's motion for summary judgment based on the "two dismissal" rule. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) provides:

(1) By Plaintiff; by Stipulation. – Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.* If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one

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year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2013) (emphasis added). For the purpose of hearing tort claims against State Agencies, the North Carolina Industrial Commission is “constituted a court” charged with determining:

whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (2013).

In order for the “two dismissal” rule to apply, “(1) the plaintiff must have filed two notices to dismiss under Rule 41(a)(1) and (2) the second action must have been based on or included the same claim as the first action.” *Dunton v. Ayscue*, 203 N.C. App. 356, 358, 690 S.E.2d 752, 753 (2010) (citation omitted). In articulating the second prong of the “two dismissal” rule test, it is clear that the claims in the dismissed actions need not be identical to the claims in the third action: “a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts.” *Id.* (citation and quotation marks omitted).

Our determination of whether claims are based upon the same transaction or occurrence require us to assess “(1) whether the issues of fact and law raised by the claim[s] . . . are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims.” *Holloway v. Holloway*, 221 N.C. App. 156, 159, 726 S.E.2d 198, 201 (2012) (citations and quotation marks omitted).

Here, it is undisputed that plaintiff filed two notices to dismiss his first and second actions under Rule 41(a)(1) and voluntarily dismissed those actions. Plaintiff only argues that the “two dismissal” rule does not apply because the third action, for the first time, alleged the negligence of hospital employee William Denning by “allowing [decedent] to be free of any restraints” when plaintiff was admitted to the hospital. Thus, plaintiff argues this specific claim has not been previously dismissed twice. Plaintiff’s argument is without merit. The case law cited

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above makes clear that the “two dismissal” rule can apply to actions with claims arising from the same transaction or occurrence against different defendants.

The first action claimed damages for the wrongful death of the decedent, including: burial expenses, medical expenses, pain and suffering, income of decedent, services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices and advice of the decedent against NCDHHS due to the negligent conduct of its employees, including Jim Osberg, stemming from the 22 July 2005 incident whereby the decedent grabbed a firearm from Deputy Pizano’s person and used the firearm to shoot a hospital employee and himself.

The second action claimed damages for the wrongful death of the decedent, burial expenses, medical expenses, pain and suffering, income of decedent, services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices and advice against defendant NCDHHS due to the negligent conduct of its employees, including Mark Van Sciver, directors and administrators of the hospital, and Jim Osberg. Plaintiff alleged the injury occurred in the following manner: “[t]he Plaintiff’s decedent, Clifton Gentry, was being involuntarily committed to Cherry Hospital in the custody of Onslow County Deputy Arturo Pizano. Once he was inside of Cherry Hospital with Deputy Pizano, he took the Deputy’s gun from him, shooting William Denning before taking his own life with the gun.”

The third action claimed damages for medical bills, personal injuries, pain and suffering, and wrongful death of the decedent against NCDHHS based on the negligent conduct of its employees, including William Denning and Jim Osberg. Plaintiff alleged the injury occurred in the following manner:

The Plaintiff’s decedent was being admitted to Cherry Hospital when William Denning took custody of Plaintiff’s decedent, allowing him to be free of any restraints. Plaintiff’s decedent then took the Sheriff’s Deputy’s sidearm and committed suicide. The firearm should not have been allowed inside of Cherry Hospital, as there is no therapeutic purpose for a firearm and firearms should not be allowed inside of Cherry Hospital under any circumstances.

Thus, it is clear that all three actions raise essentially the same issues of fact and law, substantially the same evidence bears on all actions, and a logical relationship between each of the actions exist. As such, all

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three actions were based upon the same transaction or occurrence, and thus, the “two dismissal” rule applies.

Plaintiff relies on *Wirth v. Bracey* to support his argument that “plaintiff’s cause of action in the Industrial Commission as to Employee William Denning[s] negligence is not the same as the cause of action as that filed in Superior Court.” We believe plaintiff’s reliance on *Wirth* is inapposite. The issue in *Wirth* was whether plaintiffs’ claim to recover damages for injuries against the North Carolina Highway Commission, based on the negligent conduct of the defendant-employee, constituted “another action pending between the same parties for the same cause” for abatement purposes when plaintiffs had previously filed a Superior Court action for negligence against the defendant-employee individually. *Wirth v. Bracey*, 258 N.C. 505, 507, 128 S.E.2d 810, 812 (1963). Our Supreme Court held that the two actions were distinct and separate causes of action. *Id.* *Wirth* is clearly distinguishable as that case did not involve the application of the “two dismissal” rule and involved separate causes of actions against a State agency and its employee individually. *Id.* at 507-08, 128 S.E.2d at 812-13. The case at bar, however, involves three actions against NCDHHS, not its employees in their individual capacities.

Instead, we find *Richardson v. McCracken Enterprises*, 126 N.C. App. 506, 507, 485 S.E.2d 844, 845 (1997) to be instructive. In that case, plaintiffs filed a complaint against defendant alleging “that on a number of occasions, beginning on or about 18 August 1989, defendant[] discharged diesel fuel and fuel oil on defendant’s property, causing injury to plaintiffs when it ran onto their adjoining property, causing contamination of both water and soil.” *Id.* The complaint alleged claims for trespass, strict liability, negligence, and punitive damages. *Id.* Plaintiffs filed a second complaint based on the same facts and alleged a single claim for nuisance. *Id.* Plaintiffs then dismissed the first two actions and filed a third suit, alleging all of the previous claims asserted in the first two actions. *Id.* This Court rejected plaintiffs’ argument that a “strict ‘same claim’ test applies” and held that the first two claims were “based upon the same core of operative facts relating to the contamination of plaintiffs’ property, and all of the claims could have been asserted in the same cause of action.” *Id.* at 508, 509, 485 S.E.2d at 846-47. Thus, we ruled that the “two dismissal” rule barred plaintiffs’ third action. *Id.* at 509, 485 S.E.2d at 847.

Similarly, all three of the actions in this case alleged damages based on the negligent conduct of numerous employees of NCDHHS stemming from the 22 July 2005 incident in which the decedent: was admitted to

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the hospital, grabbed Deputy Pizano's gun, and shot a hospital employee and himself. We cannot view the third action so narrowly and rule that it stemmed from a different transaction or occurrence.

III. Conclusion

Accordingly, the Full Commission did not err by dismissing plaintiff's third action based on the "two dismissal" rule and by granting defendant's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and DILLON concur.

IN THE MATTER OF P.S.

No. COA15-18

Filed 4 August 2015

Appeal and Error—interlocutory orders and appeals—child neglect—temporary disposition order—motion to transfer

Respondent mother's appeal in a child neglect case was dismissed as an appeal from an interlocutory order. The trial court entered an order only on adjudication and motion to transfer and not a final disposition order. Appeal from a temporary disposition order is not authorized under N.C.G.S. § 7B-1001(a)(3). Respondent failed to demonstrate that she was entitled to immediate appeal of the trial court's order pursuant to N.C.G.S. § 7B-1001(a).

Appeal by Respondent-Mother from order entered 2 October 2014 by Judge William Brooks in District Court, Alleghany County. Heard in the Court of Appeals 13 July 2015.

James N. Freeman, Jr. for Petitioner-Appellee Alleghany County Department of Social Services.

Robert W. Ewing for Respondent-Appellant Mother.

Kay Linn Miller Hobart, for Guardian ad Litem.

McGEE, Chief Judge.

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Respondent-Mother appeals from the trial court's order adjudicating P.S. ("the child") neglected and transferring the case to Cabarrus County. For the following reasons, we dismiss Respondent-Mother's appeal.

The Alleghany Department of Social Services ("DSS") first became involved with the family after receiving a report on 18 September 2013 alleging that Respondent-Mother was impaired and had overdosed on drugs. The investigating social worker found that Respondent-Mother was unable to supervise the child, so the social worker arranged for the child to stay with a family friend who frequently provided care for the child. Respondent-Mother entered into a service plan with DSS, which required her to attend parenting classes and substance abuse classes.

DSS filed a juvenile petition on 29 May 2014, alleging that the child was neglected in that he did not receive proper care, supervision, or discipline from his parents and lived in an environment injurious to his welfare. DSS filed the petition after having received a second report that Respondent-Mother was impaired while caring for the child. In the petition, DSS requested that "the [trial court] hear the case to determine whether the allegations are true and whether the juvenile is in need of the care, protection, or supervision of the State."

The trial court conducted a hearing on 2 September 2014 ("the hearing") and entered a corresponding order on 2 October 2014. At the outset of the hearing, both parents moved to have the case transferred to Cabarrus County. The trial court denied their motion for immediate transfer, but limited the hearing to adjudication. The trial court concluded that the child was neglected, and "[t]hat continued custody of the minor child in the home of his parents [was] contrary to the safety, health and welfare of the minor child."

Following the adjudication, the trial court transferred the case to Cabarrus County. The trial court found that disposition in Cabarrus County was appropriate because Respondent-Mother, the father, and the child were all residing in Cabarrus County as of the date of the hearing. Respondent-Mother and the father had moved to Cabarrus County after being evicted from their apartment on 7 July 2014. At some point during the pendency of the case, the child was placed with his half-sister, the adult daughter of the child's father, who also resided in Cabarrus County. Due to the transfer of the case, the trial court did not conduct a disposition hearing or enter an order on disposition. However, the trial court gave temporary custody of the child to Alleghany DSS with custody to

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Cabarrus DSS; the trial court also ordered that the “[c]urrent placement with [the child’s half-sister] is approved.” Respondent-Mother appeals.

The guardian *ad litem* (“GAL”) has filed a motion to dismiss Respondent-Mother’s appeal. The GAL argues that, because the trial court entered an order only on adjudication and motion to transfer and not a final disposition order, the order is interlocutory and not appealable pursuant to N.C. Gen. Stat. § 7B-1001(a) (2013). For the reasons that follow, we agree.

The right to appeal in juvenile actions arising under Chapter 7B is governed by N.C. Gen. Stat. § 7B-1001(a). This statute provides that “[i]n a juvenile matter under this Subchapter, appeal of a *final order* of the court in a juvenile matter shall be made directly to the Court of Appeals.” N.C. Gen. Stat. § 7B-1001(a) (2013) (emphasis added). This statute then lists six specific types of orders from which appeal may be taken, including “[a]ny initial order of disposition and the adjudication order upon which it is based.” N.C. Gen. Stat. § 7B-1001(a)(3). The GAL argues that Respondent-Mother’s appeal is not permitted under this subsection, because the trial court did not enter a final disposition order — it only entered an adjudication order, which included a temporary disposition. We agree.

N.C. Gen. Stat. § 7B-1001(a)(3) specifies that an adjudication order may only be appealed along with a corresponding disposition order, which is lacking in this case. Furthermore, this Court has repeatedly held that appeal from a temporary disposition order is not authorized under N.C. Gen. Stat. § 7B-1001(a)(3). *In re C.M.*, 183 N.C. App. 207, 215-16, 644 S.E.2d 588, 595 (2007); *In re Laney*, 156 N.C. App. 639, 641-42, 577 S.E.2d 377, 378-79 (2003). Therefore, Respondent-Mother’s appeal from the adjudication order is not permitted under subsection (a)(3).

Respondent-Mother submits, however, that the order is appealable under N.C. Gen. Stat. § 7B-1001(a)(4), which provides for appeal from “[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile.” We disagree. First, we note that Section 7B-1001(a) specifies that appeal lies only from “a *final order*” entered by a court in a juvenile matter (emphasis added). An adjudication order — even where it includes a temporary disposition — is not a final order as contemplated by our juvenile code.

Section 7B-1001 specifically delineates the juvenile orders that may be appealed and does not provide that a party may appeal a temporary dispositional order. N.C.G.S. § 7B-1001(a) (2005); see *In re Laney*, 156 N.C. App. 639,

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643, 577 S.E.2d 377, 379 (construing a prior version of Section 7B-1001, the *Laney* Court held that a party was not entitled to appeal an adjudication and temporary dispositional order in that it was not a final order). Accordingly, respondent . . . is not entitled to appeal the temporary dispositional order. *See Laney* at 642, 577 S.E.2d at 379 (“The broad reading advocated by respondent would open the door for multiple appeals whenever adjudication orders and temporary dispositions are entered before a final disposition. The statutory language does not show that the General Assembly intended this result.”). Therefore, the assignments of error challenging the temporary dispositional order are dismissed.

C.M., 183 N.C. App. at 215-16, 644 S.E.2d at 595.

Furthermore, the trial court granted only *temporary* custody to DSS, pending the initial disposition hearing to be conducted in Cabarrus County and associated order. We find that temporary custody is not akin to the type of custody change contemplated by the General Assembly in enacting N.C. Gen. Stat. § 7B-1001(a)(4). *See, e.g., In re J.V. & M.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009) (finding that review of a permanency planning order was appropriate where the order granted guardianship, which modified custody). The temporary custody awarded here by the trial court is analogous to nonsecure custody, which the General Assembly specifically exempted from appeal under subsection (a)(4). We find further support for this position in our treatment of temporary custody orders arising under Chapter 50 of the General Statutes. We have repeatedly held that such orders are interlocutory and not immediately appealable. *See, e.g., File v. File*, 195 N.C. App. 562, 569, 673 S.E.2d 405, 410-11 (2009); *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1992). Based on the foregoing, we find no support for the position that subsection (a)(4) creates a separate route of appeal from the interlocutory order in this case.

We note that Respondent-Mother will be afforded an opportunity to appeal the 2 October 2014 adjudication order once the disposition hearing is conducted in Cabarrus County – pursuant to her motion to transfer – and the order on disposition is entered. We further note that had Respondent-Mother not attempted appeal from the adjudication order, the dispositional hearing should have been completed by 2 October 2014, and the order on disposition entered within thirty days thereafter. N.C. Gen. Stat. § 7B-901 (2013) (“The dispositional hearing shall take place immediately following the adjudicatory hearing [which occurred

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on 2 September 2014] and shall be concluded within 30 days of the conclusion of the adjudicatory hearing.”); N.C. Gen. Stat. § 7B-905(a) (2013) (“The dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing[.]”).

In conclusion, we hold that Respondent-Mother has failed to demonstrate that she is entitled to immediate appeal of the trial court’s order pursuant to N.C. Gen. Stat. § 7B-1001(a). We therefore dismiss Respondent-Mother’s appeal.

APPEAL DISMISSED.

Judges CALABRIA and HUNTER, JR. concur.

ROBERT A. IZYDORE, PLAINTIFF

v.

ALADE TOKUTA, CAESAR JACKSON, BERNICE D. JOHNSON, NORTH CAROLINA
CENTRAL UNIVERSITY, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA14-1220

Filed 4 August 2015

1. Civil Rights—42 U.S.C. § 1983—defamation—emeritus professor status denied

The trial court correctly dismissed plaintiff’s 42 U.S.C. § 1983 claim resulting from his failure to achieve professor emeritus status. Plaintiff’s § 1983 claim presumes that his interest in professor emeritus status is a protected property interest, but property interests are protected only where one has a legitimate claim of entitlement. Plaintiff failed to present sufficient record support or legal authority underlying his alleged property interest, save for a conclusory allegation, which is not accepted as true when reviewing a complaint dismissed under Rule 12(b)(6).

2. Civil Rights—42 U.S.C. § 1983—stigma plus claim—denial of emeritus professor status

Plaintiff failed to state a claim upon which relief could be granted arising from his failure to achieve professor emeritus status where he claimed that two professors made allegedly defamatory statements intending to have his nomination denied. Plaintiff brought his claim under 42 U.S.C. § 1983, based on the stigma plus

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theory. However, as determined above, plaintiff had no legitimate claim to professor emeritus status, and the denial of plaintiff's nomination to the status was not an adverse employment action sufficient to add the "plus" to the reputational stigma of the professors' allegedly defamatory remarks.

3. Civil Rights—42 U.S.C. § 1983 denial of professor emeritus status—entity claim

Plaintiff's entity liability claim arising under 42 U.S.C. § 1983 failed where the action arose from his unsuccessful application for professor emeritus status and plaintiff alleged entity liability against the university and the State. Plaintiff failed to identify a protected property or liberty interest sufficient to state a claim under § 1983, and his entity liability claim arising under § 1983 also failed.

4. Libel and Slander—remarks by professors—denial of emeritus status—pleading fatally deficient

Plaintiff failed to plead a claim for defamation with sufficient particularity, rendering it facially deficient. Plaintiff did not identify with any degree of specificity the remarks made by two professors, which prevents judicial determination of whether the statements were defamatory.

5. Damages and Remedies—punitive—failure of underlying claim

Plaintiff's claim for punitive damages arising from alleged statements made during his unsuccessful nomination for professor emeritus status failed because he did not state an underlying claim upon which relief could be granted.

Appeal by Plaintiff from order entered 22 July 2014 by Judge Orlando F. Hudson, Jr. of Durham County Superior Court. Heard in the Court of Appeals 18 March 2015.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Stephanie A. Brennan, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

Robert A. Izydore ("Plaintiff") appeals from a 22 July 2014 order dismissing his amended complaint asserting seven causes of action and

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seeking injunctive relief, compensatory and punitive damages, and a declaration he be entitled to Professor Emeritus status from the North Carolina Central University (“NCCU”). After careful review, we affirm the trial court’s order in its entirety.

I. Factual & Procedural History

On 12 February 2014, Plaintiff, a retired university professor, filed an amended complaint against Alade Tokuta (“Professor Tokuta”), in his individual and official capacity; Caesar Jackson (“Professor Jackson”), in his individual and official capacity; Provost Bernice Johnson (“Provost Johnson”), in her individual and official capacity; the State of North Carolina (“State”); and NCCU (collectively, “Defendants”), arising from Defendants’ decision to deny Plaintiff’s nomination for Professor Emeritus status. Plaintiff’s complaint reveals the following facts.

Plaintiff taught chemistry at NCCU for thirty-eight years before retiring in September 2009. In May 2009, Dr. John Meyers and Chair Shawn Sendlinger called a faculty meeting to nominate Plaintiff for Professor Emeritus status and submitted his nomination portfolio. Pursuant to NCCU nomination guidelines, Plaintiff’s nomination was forwarded to a committee of eight chairs and directors of NCCU’s College of Science and Technology, which approved Plaintiff’s nomination in May 2012. Plaintiff’s nomination was then forwarded to the NCCU Faculty Senate, where it was unanimously approved in December 2012. These actions were concordant with NCCU’s nomination guidelines. Plaintiff alleges his nomination was then “erroneously” forwarded by Provost Johnson to NCCU’s Academic Planning Council (“APC”) for consideration, “thereby failing to follow the governing procedures in place when Plaintiff’s nomination for Professor Emeritus was initiated.” At the APC meeting held on 13 February 2013, Plaintiff’s nomination was debated and denied.

During the debate, Plaintiff alleges Professor Tokuta made knowingly false and defamatory statements about him to the APC, “with the malicious intent to cause Plaintiff’s nomination to be denied, thereby depriving Plaintiff of his good name and reputation in his professional community, as well as Professor Emeritus status.” Plaintiff also alleges Professor Jackson “made statements endorsing Tokuta’s defamatory statements and [similarly] published other [knowingly] false and defamatory statements” about him to the APC for the purpose of causing his nomination to be denied. Plaintiff complains he was not permitted to be present at the APC meeting and, therefore, he was unable to defend against the professors’ allegedly defamatory statements which resulted

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in the APC denying his nomination. Plaintiff further complains he was not afforded a “post-deprivation, name-clearing hearing.”

Plaintiff alleges he was “entitled to Professor Emeritus status pursuant to the rules governing the conferral of Professor Emeritus status at NCCU.” Plaintiff alleges that at NCCU,

Professor Emeritus status is not merely honorific. Rather, . . . [it] confers . . . an array of tangible benefits, including but not limited to the right to use NCCU facilities, offices, laboratories, equipment, and other valuable resources. Those resources are necessary to enable [Plaintiff] to continue to pursue his professional calling as a research scientist, to continue to publish the results of his research, and to continue to participate in other dimensions of his professional calling.

On 12 February 2014, Plaintiff filed his claims for relief. On 17 July 2014, Plaintiff amended his complaint, asserting seven causes of action: (1) deprivation of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution against all Defendants pursuant to 42 U.S.C. § 1983; (2) stigmatization in violation of the Fourteenth Amendment against Professors Tokuta and Jackson in their individual capacities pursuant to 42 U.S.C. § 1983; (3) entity liability against NCCU and the State pursuant to 42 U.S.C. § 1983; 4) slander *per se* against Professors Tokuta and Jackson in their individual and official capacities, the State, and NCCU; (5) slander *per quod* against Professors Tokuta and Jackson in their individual and official capacities, the State, and NCCU; (6) violations of the North Carolina Constitution against NCCU and the State; and (7) punitive damages. Plaintiff sought (1) a declaratory judgment that he be “entitled to Professor Emeritus status under the governing standards and procedures;” (2) injunctive relief “forbidding NCCU and the State” from denying him Professor Emeritus status and “forbidding Defendants from engaging in the same or similar defamatory conduct concerning the Plaintiff in the future;” (3) compensatory damages; (4) punitive damages; and (5) pre- and post-judgment interest and all costs of the action.

In response, all Defendants filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. This matter was heard on 17 July 2014 at the Durham County Superior Court before the Honorable Orlando F. Hudson. By order filed 22 July 2014, the trial court granted Defendants’ motion to dismiss in its entirety and denied all of Plaintiff’s claims with prejudice.

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II. Analysis**A. Standard of Review**

Plaintiff contends the trial court erred in granting Defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted as to all seven of his causes of action.

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wells Fargo Bank, N.A. v. Corneal, __ N.C. App. __, __, 767 S.E.2d 374, 377 (2014) (citation omitted). In reviewing a Rule 12(b)(6) dismissal, this Court "accept[s] all the well-pleaded facts, not conclusions of law, as true[.]" *Privette v. Univ. of N. Carolina at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (citations omitted), and is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (internal quotation marks and citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (brackets, quotation marks, and citation omitted).

B. Constitutional Claims

Plaintiff advances his first ("Deprivation of Property in Violation of the Fifth and Fourteenth Amendment"), second ("Stigmatization in Violation of the Fourteenth Amendment"), and third ("Entity Liability") claims under the rubric of 42 U.S.C. § 1983, alleging violations of his procedural due process rights.

Section 1983 provides a private right of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and

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laws[.]” 42 U.S.C. § 1983 (2014) (emphasis added). Because 42 U.S.C. § 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred[.]” *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979), “identification of a constitutionally protected right is a prerequisite of plaintiff’s right to sue under § 1983.” *Clayton v. Branson*, 170 N.C. App. 438, 452, 613 S.E.2d 259, 269 (2005) (citations omitted).

Plaintiff also advances his sixth claim (“Violations of the North Carolina Constitution and Conspiracy”) directly under the Constitution of North Carolina, alleging “[t]he same conduct that gives rise to Plaintiff’s § 1983 claims for violations of the United States Constitution also violate the parallel provisions of the North Carolina Constitution.” Therefore Plaintiff’s first, second, third, and sixth claims will be addressed together as a claim for violation of his federal and state procedural due process rights.

The Due Process Clause of “[t]he Fifth Amendment to the Constitution of the United States, applied to the States through the Fourteenth Amendment, provides in pertinent part: ‘No person shall . . . be deprived of life, liberty, or property, without due process of law[.]’” *Wang v. UNC-CH Sch. of Med.*, 216 N.C. App. 185, 201, 716 S.E.2d 646, 656-57 (2011) (citation and quotation marks omitted). “Both the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution provide protection against deprivation of liberty or property interests secured by the Bill of Rights or created by state law without adequate procedure, such as notice and an opportunity to be heard.” *Toomer v. Garrett*, 155 N.C. App. 462, 474, 574 S.E.2d 76, 87 (2002) (citing *Paul v. Davis*, 424 U.S. 693 (1976); *Wuchte v. McNeil*, 130 N.C. App. 738, 505 S.E.2d 142 (1998); *Howell v. Carolina Beach*, 106 N.C. App. 410, 417 S.E.2d 277 (1992)). “Decisions as to the scope of procedural due process provided by the federal constitution are highly persuasive with respect to that afforded under our state constitution.” *Id.* (citing *State v. Young*, 140 N.C. App. 1, 535 S.E.2d 380 (2000)). “At the threshold of any procedural due process claim is the question of whether the complainant has a liberty or property interest, determinable with reference to state law, that is protectible under the due process guaranty.” *Maines v. City of Greensboro*, 300 N.C. 126, 134, 265 S.E.2d 155, 160 (1980) (citations omitted).

1. Property Deprivation Claim

[1] Plaintiff contends his constitutional rights secured by the Fifth and Fourteenth Amendments to the United States Constitution were violated

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and claims the benefit of section 1983 by virtue of his “due process property interest” in Professor Emeritus status, of which he contends NCCU deprived him without due process.

“Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Tripp v. City of Winston-Salem*, 188 N.C. App. 577, 582, 655 S.E.2d 890, 893 (2008) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Therefore, the determination of whether Plaintiff has a claim of entitlement to Professor Emeritus status requires this Court to look to the source which created the alleged property interest. *See id.*

However, Plaintiff does not cite any statute or university regulation which allegedly created the property interest to which Plaintiff claims entitlement. Limited as we are to considering only matters within the pleadings in reviewing a Rule 12(b)(6) motion to dismiss, we cannot discern whether “rules governing the conferral of Professor Emeritus status” secured any cognizable entitlement to this honorary status. As Plaintiff failed to include the rules under which he claims created his alleged entitlement, he has failed to demonstrate the existence of a protected property interest, because he has not shown he had any more than an expectation he would be nominated for the status.

The procedural protection of property provided by due process secures “interests that a person *has already acquired* in specific benefits.” *Roth*, 408 U.S. at 576 (emphasis added). However, “[t]he procedural component of the Due Process Clause does not protect everything that might be described as a ‘benefit[.]’” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (citing *Roth*, 408 U.S. 564). “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire” and “more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.* (citing *Roth*, 408 U.S. 564). “[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Id.* at 756 (citation omitted).

Here, Plaintiff’s section 1983 claims presume his interest in Professor Emeritus status is a protected property interest; however, property interests are only protected where one has a legitimate claim of entitlement. Plaintiff identifies no legal basis to support his assertion of a “due process property interest” secured by the United States or North Carolina constitutions, or any federal or state law, in the

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conferral of Professor Emeritus status to a retired NCCU professor. While Plaintiff contends he acquired “a legitimate claim of entitlement,” he fails to present sufficient record support or legal authority underlying his alleged property interest, save for the conclusory allegation that “[Plaintiff] was entitled to Professor Emeritus status pursuant to the rules governing the conferral of Professor Emeritus status at NCCU.” Plaintiff failed to include the “standards and procedures enacted at the time Plaintiff’s nomination process began.” In reviewing a complaint dismissed under Rule 12(b)(6), this Court treats a plaintiff’s factual allegations as true, but it does not “accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Strickland*, 194 N.C. App. at 20, 669 S.E.2d at 73 (internal quotation marks and citations omitted).

In the instant case, at no point before or after retirement did Plaintiff actually acquire the specific benefit of Professor Emeritus status. He was merely “nominated.” No alleged facts, even when taken as true, indicate nomination results in automatic approval. To the contrary, Plaintiff’s complaint forecasts that conferral of the status is a discretionary university decision; the nomination must pass several stages of approval by multiple committees. Such a discretionary conferral process cannot give rise to more than a “unilateral expectation” of the status. *See Clayton*, 170 N.C. App. at 454-55, 613 S.E.2d at 271. We find analogous and instructive this Court’s discussion of discretionary employment decisions:

To assess a candidate’s accomplishments . . . necessarily involves subjective judgment and the substantial exercise of discretion. The regulations and guidelines [for doing so] in no way create the type of clear, nondiscretionary “entitlement” . . . that the Supreme Court has found to be necessary to establish a constitutionally protected property interest.

Id. at 454, 613 S.E.2d at 271 (quoting *Harel v. Rutgers*, 5 F. Supp.2d 246, 273 (D.C.N.J. 1998)).

Furthermore, the only evidence of Plaintiff’s arrangement with NCCU indicates that he was a retired professor who, therefore, had no property interest entitled to due process protection. *See Pressman v. Univ. of N. Carolina at Charlotte*, 78 N.C. App. 296, 302, 337 S.E.2d 644, 648 (1985) (recognizing that “a state employee has no property interest protected by due process where the employee has no specific interest in continued employment, and his employment is essentially terminable at will”). Even when taken as true, the factual allegations

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do not support the conclusion NCCU was under any contractual obligation to award Plaintiff Professor Emeritus status, or that Plaintiff had a preexisting contract with NCCU that was terminated due to Defendants' activities. As such, no basis supports a claim that Plaintiff was deprived a protected property interest when NCCU faculty discretionarily denied his nomination.

Moreover, we find instructive this Court's reliance in *Pressman* on *Kilcoyne v. Morgan*, 644 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982). *See Pressman*, 78 N.C. App. 296, 337 S.E.2d 644. In *Kilcoyne*, a non-tenured state university professor claimed his due process rights were violated because the procedures set forth in East Carolina University's ("ECU") tenure and policy manual were allegedly not followed by the defendants. Finding no valid due process claim, the Fourth Circuit held:

Far from disclosing a violation of his constitutional rights, [the] complaint reveals that ECU provided procedural safeguards beyond the requirements of the Fourteenth Amendment. Because he lacked a right to further employment at ECU, his denial of tenure and further employment without *any* procedural safeguards would have been permissible under the Fourteenth Amendment. Had ECU *gratuitously* afforded tenure aspirants procedural safeguards not constitutionally mandated, deviations from these procedures would not support a claim under the Fourteenth Amendment and Section 1983.

Kilcoyne, 644 F.2d at 942 (internal citations omitted). This Court in *Pressman* applied the principles promulgated in *Kilcoyne* and held that because non-tenured state professors lacked a right to further employment, there existed no valid due process claim and, therefore, any deviation from procedural safeguards provided by the university also failed to support a due process claim. *Pressman*, 78 N.C. App. at 302, 337 S.E.2d at 648.

The absence of any record or legal support underlying Plaintiff's claim to a "due process property interest" in Professor Emeritus status compels us to conclude his section 1983 causes of action premised solely thereupon must fail. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 678, 446 S.E.2d 332, 344 (1994) ("Where there is no property interest, there is no entitlement to constitutional protection.") (citing *Huang v. Bd. of Governors of Univ. of*

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N. Carolina, 902 F.2d 1134 (4th Cir. 1990)). It is therefore unnecessary to address Plaintiff's contention that the change in NCCU's nomination procedure—which appears now to include a faculty deliberation of a nomination outside of a candidate's presence without a “name-clearing” hearing—deprived him of that alleged interest. *See Gonzales*, 545 U.S. at 757.

2. Liberty Deprivation Claim

[2] Plaintiff contends Professors Tokuta and Jackson's allegedly defamatory statements, made individually, deprived him of a constitutionally protected “liberty interest in his reputation and choice of occupation” without due process of law. Plaintiff asserts a “stigma-plus” claim that provides redress for “false statements that cause reputational stigma . . . when they are made in connection with an action that impairs a plaintiff's career options or his ability to pursue his professional calling.” We are not persuaded.

“[I]njury to reputation by itself [is] not a ‘liberty’ interest protected under the Fourteenth Amendment.” *Toomer*, 155 N.C. App. at 475, 574 S.E.2d at 87 (quoting *Siebert v. Gilley*, 500 U.S. 226, 233 (1991)). To invoke an employee's liberty interest, the stigmatizing remarks must be “made in the course of a discharge or significant demotion.” *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 309 (4th Cir. 2006) (quotation marks omitted). “[R]eassignment of an employee to a position outside his field of choice” has been held sufficient. *Id.*

Here, Plaintiff's claim for “stigma-plus” states in pertinent part: “Acting under color of state law, Tokuta and Jackson maliciously made defamatory statements concerning Plaintiff for the purpose of stigmatizing Plaintiff in his professional community and depriving Plaintiff of the Professor Emeritus status to which Plaintiff was entitled.” Plaintiff asserts that the professors' allegedly defamatory statements, which inflicted harm to his reputation, were sufficient to support a section 1983 due process claim, because they resulted in deprivation of Professor Emeritus status to which he claims entitlement. As we have already determined Plaintiff had no legitimate claim to Professor Emeritus status, we conclude the denial of Plaintiff's nomination of the status was not an adverse employment action sufficient to add the “plus” to the reputational stigma of Professors Tokuta and Jackson's allegedly defamatory remarks. As Plaintiff has not alleged harm to protected property or liberty interests, we need not discuss his challenge that NCCU's failure to provide a “name-clearing hearing” deprived him of that alleged interest.

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Plaintiff failed to state a claim upon which relief can be given under this legal theory and, therefore, we affirm the trial court's dismissal of this cause of action.

3. Entity Liability Claim

[3] Plaintiff relies on *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658 (1977) to support his contention that NCCU and the State are liable under section 1983 due to NCCU's "constitutionally inadequate training and constitutionally inadequate Professor Emeritus status approval procedures."

In *Monell*, a class of female employees under the rubric of section 1983 sued the Department of Social Services and the Board of Education of the city of New York, which "had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." 436 U.S. at 661. The district court held the acts were unconstitutional but denied petitioners' claims for backpay because the damages would come from the city of New York, which as a municipality was at the time immune from such damages. As a result, "the Supreme Court held for the first time that a local governmental body could be sued under § 1983, but . . . only 'when execution of a government's policy or custom, whether made by its law-makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[.]'" *Enoch v. Inman*, 164 N.C. App. 415, 419, 596 S.E.2d 361, 364 (2004) (quoting *Monell*, 436 U.S. at 694).

Here, unlike in *Monell*, where there was a clearly protected interest at stake, we have concluded there were no matured interests sufficient to warrant constitutional protection under section 1983. As Plaintiff has alleged no constitutionally protected interest, no entity liability can attach to NCCU for its allegedly constitutionally inadequate Professor Emeritus status conferral procedures. Because Plaintiff failed to identify a protected property or liberty interest sufficient to state a claim under section 1983, Plaintiff's entity liability claim arising under section 1983 must also fail. See *Ware v. Fort*, 124 N.C. App. 613, 616, 478 S.E.2d 218, 220 (1996) ("To state a claim under 42 U.S.C. § 1983, plaintiff must allege facts demonstrating that some right secured by the federal constitution or federal law has been abridged.") (citing *Corum v. Univ. of N. Carolina*, 330 N.C. 761, 770, 413 S.E.2d 276, 282 (1992)). Therefore, we dismiss Plaintiff's challenge and affirm the trial court's dismissal of this issue.

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C. Defamation Claims

[4] Plaintiff advances his fourth (“Slander *Per Se*”) and fifth (“Slander *Per Quod*”) actions under North Carolina tort law. Plaintiff concedes the trial court properly dismissed these actions against the State, NCCU, and Professors Tokuta and Jackson in their official capacities, based upon the defense of sovereign immunity and, therefore, we need not address these actions. However, Plaintiff asserts these actions against Professors Tokuta and Jackson in their individual capacities were improperly dismissed. We disagree.

Under North Carolina law, slander *per se* and slander *per quod* are the two actionable classes of oral defamation. Slander *per se* relates to false remarks that “in themselves (*per se*) may form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed[.]” *Donovan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 574 (1994) (quoting *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969)). Specifically, this former class of oral defamation is “‘an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease.’” *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 281, 648 S.E.2d 261, 263 (2007) (quoting *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002)). Our Courts have held that “alleged false statements . . . calling plaintiff ‘dishonest’ or charging that plaintiff was untruthful and an unreliable employee, are not actionable *per se*.” *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 82, 266 S.E.2d 861, 865 (1980) (*italics added*).

Slander *per quod* relates to false remarks which may “sustain an action only when causing some special damages (*per quod*), in which case both the malice and the special damage must be alleged and proved.” *Beane*, 5 N.C. App. at 277, 168 S.E.2d at 237 (*emphasis added*) (*citation omitted*). This latter class comprises a remark which is not defamatory on its face but causes injury with “extrinsic, explanatory facts.” *Donovan*, 114 N.C. App. at 527, 442 S.E.2d at 574-75 (quoting *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 467 (1955)). To prevail on a slander *per quod* claim, “the injurious character of the words and some special damage must be pleaded and proved.” *Beane*, 5 N.C. App. at 278, 168 S.E.2d at 238. Either class of oral defamation requires that the plaintiff plead with some degree of particularity the words attributed to the defendant.

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Our Supreme Court has explained allegedly slanderous remarks need not be repeated verbatim, but they must “be alleged ‘substantially’ in *haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory.” *Stutts*, 47 N.C. App. at 83-84, 266 S.E.2d at 866. Furthermore, under Rule 8(a)(1) of the North Carolina Rules of Civil Procedure, the pleading must contain “[a] short and plain statement of the claim *sufficiently particular* to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]” N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2014) (emphasis added) (noting in the editorial comments that “[b]y specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules”).

Here, Plaintiff’s alleges:

Upon information and belief, at the February 13, 2013 meeting of the APC, immediately before the APC voted on Plaintiff’s nomination, Defendant Tokuta made false and defamatory statements concerning Plaintiff to the APC, knowing that his defamatory statements were false, and with the malicious intent to cause Plaintiff’s nomination to be denied, thereby depriving Plaintiff of his good name and reputation in his professional community, as well as Professor Emeritus status.

Plaintiff fails to identify with any degree of specificity the allegedly defamatory remarks made by Professors Tokuta or Jackson, either specifically or in substance, which prevents judicial determination of whether the statements were defamatory. Indeed, Plaintiff’s amended complaint contains no further detail at all about what was allegedly said. The only basis on which this Court is left to determine the defamatory nature of the alleged statements is Plaintiff’s conclusory allegation that the statements were “false and defamatory.” Under a Rule 12(b)(6) analysis, this Court does not “accept as true allegations that are merely conclusory[.]” *Strickland*, 194 N.C. App. at 20, 669 S.E.2d at 73 (quotation marks and citations omitted).

While the Court cannot say whether the alleged statements were defamatory, it can say conclusively that Plaintiff has failed to plead a claim for defamation with sufficient particularity, rendering it facially deficient. As Plaintiff failed to identify with any degree of specificity the

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allegedly slanderous statements, his causes of action for defamation do not state a claim and must fail.

D. Punitive Damages

[5] Because Plaintiff has failed to state any claim upon which relief may be granted, his claim for punitive damages necessarily fails. *See Oestreicher v. Amer. Nat'l Stores, Inc.*, 290 N.C. 118, 134, 225 S.E.2d 797, 807-08 (1976) ("If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award.") (citations omitted).

III. Conclusion

Based on the foregoing and our review of the record, we affirm the trial court.

AFFIRMED.

Judges Stephens and Tyson concur.

BRUCE FLETCHER NELSON AND JAN NELSON MACINNIS, PLAINTIFFS
v.
STATE EMPLOYEES' CREDIT UNION AND GWYN R. PARSONS, DEFENDANTS

No. COA14-1393

Filed 4 August 2015

1. Trusts—two summary judgment proceedings—different issues—statutory trust—common law trust

Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the trial court (Judge Baddour) did not impermissibly overrule an earlier summary judgment ruling by Judge Blount. Judge Baddour did not rule that Judge Blount's summary judgment order—which only considered whether the credit union had violated N.C.G.S. § 54-109.57—was erroneous. Rather, Judge Baddour ruled that, notwithstanding the statutory violation found by Judge Blount, the credit union should prevail under the common law.

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2. Trusts—statutory Payable on Death account—did not supplant common law Totten Trust

Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the statutory Payable on Death account is the sole means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. The General Assembly expressed a clear intent for the Payable on Death statute (N.C.G.S. § 54-109.57) to *supplement*, not to supplant, the existing common law of trust formation.

3. Trusts—Totten Trust—summary judgment

Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the credit union had failed to show that a common law Totten trust had been created. The credit union presented undisputed evidence that the grantor created a common law Totten trust as a matter of law: the grantor expressed his intent to create a trust, identified the specific sum of money to be placed into the trust account, and identified the beneficiary of the trust.

Appeal by plaintiffs from judgment entered 27 August 2015 by Judge Allen Baddour in Orange County Superior Court and by defendant State Employees' Credit Union from order entered 28 October 2010 by Judge Marvin K. Blount, III. Heard in the Court of Appeals 19 May 2015.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for plaintiff-appellants.

Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips, III and Thomas P. Holderness, for defendant-appellee.

DIETZ, Judge.

Shortly before he died, James Nelson called his account representative at the State Employees' Credit Union ("SECU") and told her he wanted to move \$85,000 from his revocable living trust to a new account with only one of his three children as the beneficiary. The credit union prepared the paperwork for a statutory "Payable on Death" account to achieve Mr. Nelson's wishes. After his death, the credit union transferred

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the funds to Mr. Nelson's daughter, whom he had identified as the beneficiary of the Payable on Death account.

Mr. Nelson's other two children then sued, arguing, among other things, that Mr. Nelson and SECU had failed to comply with the statutory requirements for creating a Payable on Death account. The trial court agreed and entered partial summary judgment in Plaintiffs' favor on that issue. But the trial court later entered summary judgment in SECU's favor, and dismissed all of Plaintiffs' claims, on the ground that Mr. Nelson, while not complying with the Payable on Death statutory requirements, had nevertheless created a valid common law tentative or "Totten" trust that had the same effect.

Plaintiffs argue on appeal that the Payable on Death statute supplanted and eliminated the common law of tentative or Totten trusts and that, in any event, Mr. Nelson's actions were insufficient to establish a common law tentative trust.

As explained below, we reject these arguments. As we have previously held, a grantor who sought to create a statutory Payable on Death account but failed to satisfy the statutory criteria may rely on the common law to demonstrate the existence of a valid tentative or Totten trust as an alternative. The General Assembly expressly envisioned this outcome when it provided that the statute was not exclusive and that common law remedies were preserved.

Here, undisputed evidence in the record shows that Mr. Nelson expressed his intent to place \$85,000 in a tentative trust with his daughter as the beneficiary. Although the document Mr. Nelson signed described itself as a "Payable on Death" account and not a trust, this Court has held that an instrument need not contain the word "trust" in order to create a valid trust. Because Mr. Nelson satisfied the legal requirements for creation of a tentative trust, we affirm the trial court's judgment.

Facts and Procedural History

On 3 October 2008, James Nelson, father of Plaintiffs Bruce Nelson and Jan MacInnis, telephoned his local State Employees' Credit Union branch in Boone and requested to move \$85,000 out of his accounts within his revocable living trust and place the funds in a new account with his other daughter, Martha Brown, as beneficiary. Mr. Nelson spoke with Ellen Shook, a financial services officer at the Boone branch. Ms. Shook previously had done business with Mr. Nelson over the phone and recognized his voice. She collected the necessary information to open a statutory "Payable on Death" account and filled out the required account

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processing form. The form identified the new account as a “Payable on Death” account and stated that Martha Brown was the “beneficiary.”

Ms. Shook informed Mr. Nelson that his signature was required on the account form and that she would mail him the form to sign. The signature line on the form indicated that Mr. Nelson had received and read a copy of the Rules and Regulations governing the account, but Ms. Shook admitted she did not mail Mr. Nelson a copy of the Rules and Regulations. Nevertheless, Nelson signed the form and mailed it back within a few days.

After Mr. Nelson passed away, SECU informed Martha Brown that the account had transferred to her, and Ms. Brown withdrew the \$85,000.

Plaintiffs, who are Ms. Brown’s brother and sister, then sued her, alleging that she breached her fiduciary duties to her father and his estate. Plaintiffs later filed an amended complaint adding SECU as a party and alleging negligence and wanton disregard of the rights of the deceased and his rightful heirs, fraud, constructive fraud, unfair and deceptive trade practices, and conversion.

On 28 October 2010, the trial court, the Honorable Marvin K. Blount, III, presiding, granted partial summary judgment for Plaintiffs, ruling “that SECU violated N.C. Gen. Stat. § 54-109.57 and failed to create a right of survivorship in defendant Martha Nelson Brown to the proceeds of the ‘payable on death’ account.” SECU appealed this ruling, but this Court dismissed the appeal as interlocutory. *Nelson v. Brown*, 217 N.C. App. 400, 720 S.E.2d 30 (2011). The case continued in the trial court.

On 4 August 2014, SECU filed a motion for summary judgment arguing that, despite the trial court’s ruling that it failed to comply with the Payable on Death statute, SECU was entitled to judgment because Mr. Nelson’s actions created a common law tentative or Totten trust. On 27 August 2014, the trial court, the Honorable Allen Baddour, presiding, granted summary judgment in favor of SECU. Plaintiffs timely appealed this second summary judgment order, and SECU cross-appealed the first summary judgment order.

Analysis

The trial court entered summary judgment for SECU on the ground that Mr. Nelson placed his SECU deposit account in a common law tentative or “Totten” trust with his daughter Martha Brown as beneficiary. Thus, the court found that Plaintiffs could not prevail on their tort claims because SECU properly transferred the assets in the deposit account to Ms. Brown upon Mr. Nelson’s death.

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Plaintiffs challenge the trial court's holding on three grounds. First, Plaintiffs argue that the court's second summary judgment ruling impermissibly overturned its first summary judgment ruling in favor of Plaintiffs. Second, Plaintiffs argue that the statutory Payable on Death account is the exclusive means to form a tentative trust in North Carolina, supplanting the common law. Finally, Plaintiffs argue that SECU failed to show that Mr. Nelson created a common law tentative trust as a matter of law. For the reasons discussed below, we reject each of these arguments.

I. One Superior Court Judge Overruling Another

[1] Plaintiffs first argue that Judge Baddour's summary judgment ruling impermissibly overruled an earlier summary judgment ruling by Judge Blount. We disagree.

It is well-settled that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

Judge Blount's 28 October 2010 partial summary judgment order concerned only one issue: whether SECU "violated N.C. Gen. Stat. § 54-109.57 and failed to create a right of survivorship in defendant [Ms.] Brown." Judge Blount held that, based upon the evidence before him and the arguments of counsel, SECU had indeed violated N.C. Gen. Stat. § 54-109.57.

Later, in its 4 August 2014 motion for summary judgment, SECU argued that, notwithstanding Judge Blount's statutory ruling, SECU was entitled to summary judgment on its common law theory:

Regardless of the answer to [the] question [of whether SECU violated N.C. Gen. Stat. § 54-109.57], summary judgment is appropriate for SECU because (i) N.C. Gen. Stat. § 54-109.57 is not the sole legal way to convey a future interest in a share term certificate; and (ii) James Nelson gave a valid contingent future interest in the share term certificate at issue to Martha Brown.

During the hearing on SECU's motion for summary judgment, Judge Baddour discussed Judge Blount's partial summary judgment order:

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I don't hear an argument from [SECU] that, in fact, I should find that it did comply with the statute. I think they accept . . . that that is the law in this case. I think the argument is that – their argument is that let's draw two circles and that – what they did does not fit in the circle that is the statute, but is in a broader circle that would allow it to be legal for other reasons. So, I appreciate that Judge Blount's ruling is the law of the case, and I'm not going to find that [SECU] complied with the statute by having the language in there and all those things; that's not the question before me. . . . I am bound by Judge Blount's ruling. I'm convinced I am.

In sum, SECU did not argue that Judge Blount's partial summary judgment order was erroneous, and Judge Baddour did not find that it was, nor did he overrule that earlier order. Instead, SECU argued that, notwithstanding its violation of N.C. Gen. Stat. § 54-109.57, it could still prevail on its common law theory. Judge Baddour's summary judgment ruling was based on that argument, not the statutory argument previously considered by Judge Blount. Accordingly, we reject Plaintiffs' argument that one superior court judge improperly overruled another in this case.

II. Statutory Preemption of the Common Law of Tentative Trusts

[2] Plaintiffs next argue that the statutory Payable on Death account is the sole means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. Plaintiffs contend that the statute effectively superseded the common law of tentative or Totten trusts. We disagree.

Ordinarily, when the General Assembly “legislates with respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the law of the State.” *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 473, 515 S.E.2d 675, 691 (1999). Here, the Payable on Death statute creates a statutory vehicle to create the same beneficiary rights in a deposit account that can be created through a common law tentative or Totten trust. Indeed, this Court has referred to the statutory Payable on Death accounts as a statutory “Totten” trust. *See Estate of Redden ex rel. Morley v. Redden*, 179 N.C. App. 113, 119, 632 S.E.2d 794, 799 (2006).

But the General Assembly can choose *not* to supplant the common law when it legislates, *see, e.g., State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 601, 513 S.E.2d 812, 821 (1999), and that is precisely what it

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did here. The Payable on Death statute provides as follows: “This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate.” N.C. Gen. Stat. § 54-109.57(a1) (2013).¹ Thus, the General Assembly expressed a clear intent for the Payable on Death statute to *supplement*, not to supplant, the existing common law of trust formation.

In an analogous context, we have previously addressed this issue and held that the Payable on Death statute exists as an alternative to the common law. See *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 65 (2001). In *Bland*, the Court addressed whether the Payable on Death statute applicable to savings and loan associations supplanted the common law. That statute is substantively identical to the Payable on Death statute governing credit unions, which is at issue in this case. Compare N.C. Gen. Stat. § 54B-130 with N.C. Gen. Stat. § 54-109.57.² Both statutes have the identical language providing that the statute “shall not be deemed exclusive” and that non-conforming accounts are governed by “the common law, as appropriate.” N.C. Gen. Stat. § 54B-130(a)(1); N.C. Gen. Stat. § 54-109.57(a)(1).

The grantor in *Bland* failed to sign a statement containing the necessary statutory language—the same statutory error that Plaintiffs alleged in this case—and failed to comply with the statute in several other ways. This Court acknowledged that “the purported trust agreement does not comply with G.S. § 54B-130” but held that, because of the non-exclusive language in the statute, “the issue is whether the trust agreement created a valid trust pursuant to the common law.” *Bland*, 143 N.C. App. at 286, 547 S.E.2d at 65. In other words, this Court held that the common law is available as an alternative to the Payable on Death statute.

In sum, the Payable on Death statute is not the exclusive means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. To be sure, the statutory method will be preferable in nearly every instance, because it lists specific steps that ensure creation of the Totten trust and thus provides certainty to all parties involved. See N.C. Gen. Stat. § 54-109.57A (the Payable on Death

1. Although this case involves now-repealed N.C. Gen. Stat. § 54-109.57, the same language is found in the current version of the Payable on Death statute at N.C. Gen. Stat. § 54-109.57A(b).

2. Again, these statutes have since been repealed and re-enacted as N.C. Gen. Stat. § 54B-130.1 and N.C. Gen. Stat. § 54-109.57A, respectively. The relevant statutory language remains the same.

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statute for credit unions). But as this Court held in *Bland*, the General Assembly chose not to supplant the existing common law trust options when it enacted the statute. As a result, a grantor who sought to create a statutory Payable on Death account but failed to satisfy the statutory criteria may rely on the common law to demonstrate the existence of a valid tentative or Totten trust as an alternative. Accordingly, we reject Plaintiffs' argument.

III. Creation of a Tentative or Totten Trust

[3] Finally, Plaintiffs argue that SECU failed to show that Mr. Nelson established a common law tentative trust for his deposit account.

To create a tentative or Totten trust, the grantor must satisfy the same criteria necessary to establish any other valid trust: "(1) sufficient words to show intention to create the trust; (2) a definite subject; and (3) an ascertained object." *Bland*, 143 N.C. App. at 288-89, 547 S.E.2d at 67. The distinguishing feature of a tentative trust is that "the depositor retains complete control over the funds until his death, the trust is fully revocable, and is revoked in part each time the settlor withdraws funds from the account." *Jimenez v. Brown*, 131 N.C. App. 818, 824-25, 509 S.E.2d 241, 246 (1998); *see also Bland*, 143 N.C. App. at 285, 547 S.E.2d at 65.

We hold that SECU presented undisputed evidence demonstrating that Mr. Nelson created a common law tentative trust as a matter of law. Mr. Nelson signed a bank form indicating that he was creating a "Payable on Death" account in which his daughter Martha Brown was the beneficiary. Ellen Shook, the SECU employee who handled Mr. Nelson's Payable on Death account request, testified that Mr. Nelson called her and told her that he wanted to create a new account "with his daughter [Martha Brown] as beneficiary." Mr. Nelson's assets with SECU were all within a revocable living trust, and he explained to Ms. Shook that he wanted to move \$85,000 from that trust into a separate one with Ms. Brown as the beneficiary. Thus, Mr. Nelson expressed his intent to create a trust, identified the specific sum of money to be placed into the trust account, and identified the beneficiary of the trust.

To be sure, the document that Mr. Nelson signed did not use the word "trust" because that form was intended to be used to create a statutory Payable on Death account, not a common law one. But this Court has held that it is not necessary to use the word "trust" in order to satisfy the three elements of a valid trust. *See Carver v. Carver*, 188 N.C. App. 164, 654 S.E.2d 833 (2008). The text of the form, together with

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Mr. Nelson's instructions to SECU concerning his intent, are sufficient to satisfy the requirements for creation of a valid tentative trust account.

Plaintiffs also argue that Mr. Nelson's actions were testamentary and that he never passed a present beneficial interest to his daughter as required for formation of a valid trust. This argument is precluded by *Bland*. In *Bland*, the plaintiff argued that the transfer of funds would occur only upon the grantor's death, and therefore the trust agreement "failed to transfer a present beneficial interest." 143 N.C. App. at 288, 547 S.E.2d at 66. This Court rejected that argument, holding that an instrument that transfers a "non-possessory interest" can still satisfy the requirement of transferring a "present beneficial interest." *Id.* "[A] trust may provide that the grantor will be entitled to possession of the property for life, or that the grantor shall be a life beneficiary of the trust" and "neither the reservation of a power to revoke the trust and take back the property, nor the retention of a power to modify the trust and change the beneficiaries, makes the instrument testamentary." *Id.*

Here, as in *Bland*, Mr. Nelson transferred a non-possessory interest to his daughter, the beneficiary of the tentative trust. Mr. Nelson retained "complete control over the funds until his death," but that is the nature of a tentative trust and it does not change the fact that the grantor of such a trust transfers a non-possessory beneficial interest upon creation of the trust. *Jimenez*, 131 N.C. App. at 824-25, 509 S.E.2d at 246; *see also Bland*, 143 N.C. App. at 288, 547 S.E.2d at 66-67.

In sum, the undisputed record evidence established that Mr. Nelson placed \$85,000 in a valid tentative trust with his daughter, Martha Brown, as beneficiary. As a result, SECU properly transferred those funds to Ms. Brown upon Mr. Nelson's death, and Plaintiffs' tort claims—which all depended on SECU wrongfully transferring those funds—fail as a matter of law. The trial court thus correctly entered summary judgment in SECU's favor on those claims. Because we affirm the trial court's final judgment on this basis, we need not address SECU's alternative arguments in its cross-appeal.

Conclusion

The judgment of the trial court is affirmed.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

PHILIPS v. PITT CNTY. MEM'L HOSP., INC.

[242 N.C. App. 456 (2015)]

SHERIF A. PHILIPS, M.D., PLAINTIFF

v.

PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, PAUL BOLIN, M.D., RALPH
WHATLEY, M.D., SANJAY PATEL, M.D., AND CYNTHIA BROWN, M.D., DEFENDANTS

No. COA14-1372

Filed 4 August 2015

1. Attorney Fees—sufficiency of evidence—frivolous or malicious claims

The trial court did not err by awarding defendants attorneys' fees where there was competent evidence to support the court's findings that plaintiff's claims were frivolous or malicious.

2. Attorney Fees—punitive damages—other claims—common nucleus—apportionment not necessary

Attorneys' fees awarded by the trial court not were excessive where plaintiff argued that the claim for punitive damages was factually and legally distinct from other claims. Apportionment of fees between the punitive damages claim and the underlying claims was unnecessary; the trial court found that plaintiff's claims arose from a common legal and factual nucleus, that the allegations in support of plaintiff's claim for punitive damages were central to defendants' liability for all the claims, and that apportionment of legal fees between the claims was impractical.

Appeal by Plaintiff from order entered 17 July 2014 by Judge Richard L. Doughton in Pitt County Superior Court. Heard in the Court of Appeals 7 May 2015.

Mark Hayes for the Plaintiff-Appellant.

Harris, Creech, Ward & Blackerby, P.A., by Jay C. Salsman and C. David Creech, for the Defendant-Appellee.

DILLON, Judge.

Sherif A. Philips ("Plaintiff") appeals from an order awarding attorneys' fees to Pitt County Memorial Hospital, Inc., Paul Bolin, Ralph Whatley, Sanjay Patel, and Cynthia Brown ("Defendants"). For the following reasons, we affirm.

PHILIPS v. PITT CNTY. MEM'L HOSP., INC.

[242 N.C. App. 456 (2015)]

I. Background

Plaintiff commenced this action against Pitt County Memorial Hospital and four physicians in connection with the hospital's decisions to suspend and subsequently revoke Plaintiff's admitting and staff privileges. Plaintiff asserted a number of claims including that for punitive damages. This appeal is the second that has been brought to this Court in this action. In the first appeal, we affirmed the trial court's grant of summary judgment in favor of Defendants. A fuller recitation of the facts and procedural history giving rise to this litigation is available for reference in that opinion, *Philips v. Pitt Cnty. Mem'l Hosp. Inc.*, 222 N.C. App. 511, 731 S.E.2d 462 (2012).

On remand from the first appeal, the trial court awarded attorneys' fees to Defendants in the amount of \$444,554.45. Plaintiff entered written notice of appeal from that award.¹

II. Analysis

Plaintiff makes essentially two arguments on appeal, which we address in turn.

A. Frivolous or Malicious

[1] In his first argument, Plaintiff contends that the trial court erred in awarding Defendants attorneys' fees because there was no competent evidence to support the court's findings that his claims were frivolous or malicious. We disagree.

In North Carolina, awards of attorneys' fees are only allowed where specifically authorized by statute. *See, e.g., In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972). In the present case, the trial court awarded attorneys' fees pursuant to N.C. Gen. Stat. § 1D-45, which authorizes awards based on frivolous or malicious claims for punitive damages. *See* N.C. Gen. Stat. § 1D-45 (2014). Specifically, the trial court determined that Plaintiff's claim for punitive damages against Defendants was frivolous or malicious.

1. Defendants have moved to dismiss this appeal based on Plaintiff's failure to include a filed and signed copy of the order appealed from in the record on appeal. Plaintiff's counsel appears to have inadvertently included a non-file stamped copy of the order in the record on appeal and has moved to amend the record to include a file stamped, signed copy of the order, or, in the alternative, petitioned for *certiorari*. We hereby deny Defendants' motion to dismiss, grant Plaintiff's motion to amend the record to include the appropriately signed and stamped copy of the order, and deny the petition for *certiorari*. We note that this formal defect, while serious, has not impaired our task of review.

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We review awards of attorneys' fees, including awards pursuant to N.C. Gen. Stat. § 1D-45, for an abuse of discretion. *GE Betz, Inc. v. Conrad*, ___ N.C. App. ___, ___, 752 S.E.2d 634, 654 (2013). However, in evaluating whether the court abused its discretion, we consider the court's findings in support of its award. *Brown's Builders Supply, Inc. v. Johnson*, ___ N.C. App. ___, ___, 769 S.E.2d 653, 657-58 (2015). We review these findings to determine whether competent evidence supports them and whether they, in turn, support the court's conclusions. *GE Betz*, ___ N.C. App. at ___, 752 S.E.2d at 654.

Under N.C. Gen. Stat. § 1D-45, a claim for punitive damages is "frivolous" where its "proponent can present no rational argument based upon the evidence or law in support of it." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002) (internal marks omitted), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004). Furthermore, a claim is "malicious" where it is "wrongful and done intentionally without just cause or excuse or as a result of ill will." *Id.*

In the present case, the trial court made a number of findings, including that Plaintiff had admitted to unprofessional conduct and that this was a valid basis for the initiation of corrective action under hospital bylaws; that Plaintiff misrepresented the true nature of his medical practice and never would have received admitting privileges were it not for this misrepresentation; that Plaintiff failed to comply with conditions of his reappointment and the requirements of hospital bylaws after corrective action was initiated against him; that Plaintiff had knowledge of his lack of compliance and continued to violate flagrantly the bylaws after being notified of his non-compliance; and that despite this knowledge, Plaintiff "persisted in his allegations that [his hospital privileges were suspended and then revoked] without any valid factual or legal support."

We believe that there is competent evidence supporting all of the challenged findings, that the findings as a whole support the court's ultimate findings that Plaintiff's claims were frivolous and malicious, and that the court's award of attorneys' fees reflected a reasoned judgment. Therefore, we hold that the trial court did not abuse its discretion. Accordingly, this argument is overruled.

B. Apportionment of Fees

[2] Plaintiff next argues that the attorneys' fees awarded by the trial court were excessive because the claim for punitive damages was factually and legally distinct from the other claims and recovery of attorneys'

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[242 N.C. App. 456 (2015)]

fees was only authorized for the punitive damages claim, not the other claims. We disagree.

As stated above, there is a statutory basis for an award of attorneys' fees to Defendants in their defense of the punitive damages claim asserted by Plaintiff. It is true, as Plaintiff contends, that there is no statutory basis to award attorneys' fees to Defendants for their defense of other claims asserted by Plaintiff. However, we have held that where attorneys' fees are not recoverable for defending certain claims in an action but are recoverable for other claims in that action, fees incurred in defending both types of claims are recoverable where the time expended on defending the non-recoverable and the recoverable claims overlap and the claims arise "from a common nucleus of law or fact." *Okwara v. Dillard Dep't. Stores, Inc.*, 136 N.C. App. 587, 595, 525 S.E.2d 481, 486-87 (2000). Therefore, as we have held, apportionment of fees is unnecessary when all the claims in an action arise from the same nucleus of operative fact such that "each claim [is] 'inextricably interwoven' with the other claims[.]" *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 467, 553 S.E.2d 431, 443 (2001).

In the present case, the trial court found that Plaintiff's claims arise from a common legal and factual nucleus; that the allegations in support of Plaintiff's claim for punitive damages were central to Defendants' liability for all the claims; and that apportionment of legal fees between the claims was impractical. Plaintiff focuses on the element of frivolousness or maliciousness, which the punitive damages claim did not share with the underlying claims, in arguing that the factual and legal nucleus of the claims differed. We are not persuaded.

We need only look to the allegations in Plaintiff's complaint to see that Plaintiff alleged and incorporated by reference all the allegations of conduct comprising the substance of his other claims in support of his claim for punitive damages, adding only that in addition to all his other allegations, the injuries inflicted against him were done with malice, conscious disregard, intent, design, and purpose. We do not believe that the trial court erred in determining that both the recoverable punitive damages claim and the non-recoverable claims arose from a common nucleus of law and fact and were "inextricably interwoven" with one another. Therefore, we hold that apportionment of fees between the punitive damages claim and the underlying claims was unnecessary. Accordingly, this argument is overruled.

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III. Conclusion

For the reasons stated herein, the trial court's award of attorneys' fees is affirmed.

AFFIRMED.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA
v.
HOWARD JUNIOR EDGERTON, DEFENDANT

No. COA13-1235-2

Filed 4 August 2015

1. Sentencing—aggravating factor—DVPO—position of trust or confidence

The trial court did not err when sentencing defendant for feloniously violating a Domestic Violence Protective Order (DVPO) against his former girlfriend by finding as an aggravating factor that he took advantage of a position of trust or confidence. Defendant's argument to the contrary assumes that "trust and confidence" automatically exists in all of the "personal relationships" provided by the DVPO statute, but the definition of personal relationship under N.C.G.S. § 50B-1(B) does not include any element which would require proof of a position of trust or confidence or the abuse of that position any evidence offered by the State to show that defendant took advantage of a position of trust or confidence may be used to establish a statutory aggravating factor.

2. Constitutional Law—effective assistance of counsel—insufficient evidence

In a case involving a Domestic Violence Protective Order, a claim for ineffective assistance of counsel was dismissed (with defendant having the choice of filing a motion for appropriate relief) where the record lacked sufficient evidence to make a determination.

Appeal by Defendant from judgment entered 21 March 2013 by Judge Gary M. Gavenus in the Rutherford County Superior Court. Originally heard in the Court of Appeals 20 March 2014. By published opinion

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entered 17 June 2014, a divided panel of this Court found existence of plain error and remanded for a new trial. *State v. Edgerton*, __ N.C. App. __, __, 759 S.E.2d 669, 675 (2014). By order entered 10 April 2015, the Supreme Court reversed the decision of this Court based on “the reasons stated in the dissenting opinion” and “remanded to the Court of Appeals for consideration of defendant’s remaining issues on appeal.” *State v. Edgerton*, __ N.C. __, 769 S.E.2d 837 (2015).

Attorney General Roy A. Cooper, III, by Assistant Attorney General Teresa M. Postell, for the State.

Michael E. Casterline for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

This case comes to us on remand from the Supreme Court of North Carolina, reversing this Court’s prior decision, for the purpose of considering the issues raised in Defendant’s original appeal but not decided. On remand, after reviewing the opinion from the Supreme Court and the arguments advanced by the parties, we find Defendant received a trial free of error.

I. Procedure

Defendant originally argued before this Court that (1) the trial court committed plain error by failing to instruct the jury on the lesser-included misdemeanor offense of violation of a domestic violence protective order (“DVPO”); (2) Defendant was denied effective assistance of counsel when his trial attorney failed to request instruction on the lesser-included misdemeanor offense; (3) the trial court erred in sentencing Defendant within the aggravated range based in part on the aggravating factor of abuse of a position of trust or confidence; and (4) Defendant’s habitual felon status was void because the underlying conviction was in error. *See State v. Edgerton*, __ N.C. App. __, __, 759 S.E.2d 669 (2014), *rev’d* __ N.C. __, 769 S.E.2d 837 (2015). By a 2-1 vote, this Court found the trial court’s failure to instruct the jury on a lesser-included misdemeanor offense rose to the level of plain error. *Id.* at 674-75. The North Carolina Supreme Court reversed this Court’s decision based on the dissenting opinion, which stated the failure of the trial court to instruct the jury on the lesser-included misdemeanor DVPO violation did not rise to the level of plain error. *See State v. Edgerton*, __ N.C. __, 769 S.E.2d 837 (2015).

This case comes back to this Court on remand for the purpose of deciding Defendant’s remaining three issues not addressed by our first

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opinion: (1) whether the trial court erred in sentencing Defendant within the aggravated range; (2) whether Defendant received ineffective assistance of counsel; and (3) whether or not Defendant's habitual felon status pleading is void. This Court's prior opinion deciding whether Defendant feloniously violated a DVPO against his former girlfriend, Ms. King, presented a summation of the facts and procedural history of this case, which are incorporated herein. *See Edgerton*, __ N.C. App. at __, 759 S.E.2d at 671-72.

II. Defendant's Sentence Aggravation Claim

[1] Defendant argues the trial court erred in sentencing him within the aggravated range based in part on the statutory aggravating factor that "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." *See* N.C. Gen. Stat. § 15A-1340.16(d)(15) (2013). In his brief, Defendant asserts "[s]ince a personal relationship between the parties is a necessary prerequisite to obtaining a [DVPO] under Chapter 50B, the existence of a position of trust between the parties is assumed." Therefore, according to Defendant, "that trust cannot be used to aggravate the sentence of a criminal defendant who violates the protective order." We disagree.

To issue a DVPO, the court must "find[] that an act of domestic violence has occurred[.]" N.C. Gen. Stat. § 50B-3(a) (2013). Domestic violence is "the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a *personal relationship*[.]" N.C. Gen. Stat. § 50B-1(a) (2013) (emphasis added). Therefore, a past or current personal relationship is a prerequisite to obtaining a DVPO. N.C. Gen. Stat. § 50B-1 provides examples of "personal relationships" encompassed by the statute, including, among others, "current or former spouses; persons of opposite sex who live together or have lived together; [and] . . . persons of the opposite sex who are in a dating relationship or have been in a dating relationship." N.C. Gen. Stat. § 50B-1(b) (2013).

Our General Statutes provide "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" N.C. Gen. Stat. § 15A-1340.16(d) (2013). Furthermore, "[a] sentence may not be aggravated by evidence supporting an element of the same offense." *State v. Wilson*, 354 N.C. 493, 522, 556 S.E.2d 272, 291 (2001), *overruled on other grounds by State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002). To feloniously violate a DVPO with a deadly weapon, a defendant must: (1) be in possession of a deadly weapon on or about his person or have the weapon in close proximity to his person;

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and (2) knowingly violate a valid protective order. *See* N.C. Gen. Stat. § 50B-4.1(g) (2013).

Here, Defendant's argument assumes that "trust and confidence" automatically exists in all of the "personal relationships" provided by the statute, and ascribes to N.C. Gen. Stat. § 50B-1 provisions which it does not include. The definition of a "personal relationship" under N.C. Gen. Stat. § 50B-1(b) does not include any element whatsoever which would require proof of either a position of trust or confidence or the abuse of that position. Thus, any evidence offered by the State to show that Defendant took advantage of a position of trust or confidence may be used to establish a statutory aggravating factor. Accordingly, we hold the trial court did not err in finding this as an aggravating factor, nor did it err in sentencing Defendant to a sentence within the aggravated range.

III. Defendant's Ineffective Assistance of Counsel Claim

[2] The second issue for our consideration is whether Defendant was denied effective assistance of counsel when his trial attorney failed to request a jury instruction on the lesser-included misdemeanor offense of violation of a DVPO. There is a two-prong test for ineffective assistance of counsel claims. For Defendant to show ineffective assistance of counsel, "[he] must show both that 'counsel's performance was deficient' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Gillespie*, __ N.C. App. __, __, 771 S.E.2d 785, 788 (2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

Here, the record lacks sufficient evidence to make a determination on Defendant's ineffective assistance of counsel claim. Additional fact-finding is necessary to determine if Defendant's attorney's conduct fell below the objective standard of reasonableness. Therefore, we dismiss this claim, allowing Defendant to seek a motion for appropriate relief if he so chooses.

IV. Defendant's Habitual Felon Status Claim

[3] As a result of our Supreme Court finding no plain error as to the jury instruction of violation of a DVPO with a deadly weapon, Defendant's habitual felon status is not void because Defendant was validly convicted of felony violation of a DVPO.

NO ERROR.

Judges Stroud and Dillon concur.

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STATE OF NORTH CAROLINA

v.

JESSICA RASHEEDA JORDAN, DEFENDANT

No. COA14-1070

Filed 4 August 2015

Search and Seizure—warrantless entry—broken apartment window—broad daylight and heavy traffic

The trial court erred by denying defendant's motion to suppress evidence obtained as a result of a warrantless entry into her apartment. The officers' testimony—that they observed a broken window, found the apartment door unlocked, and received no response from inside the apartment—was insufficient to support the conclusion that the officers had a reasonably objective belief that a breaking and entering was in progress or had been recently committed. These events took place in the middle of the day, in a heavy-traffic area of an apartment complex, and in view of many common areas of the complex. The Court of Appeals reversed the suppression order and vacated the judgment entered on defendant's guilty plea.

Appeal by defendant from judgment entered 25 February 2014 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 4 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Alesia Balshakova, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

GEER, Judge.

Defendant Jessica Rasheeda Jordan appeals from a judgment entered on her plea of guilty to misdemeanor child abuse and from a conditional discharge entered on her plea of guilty to possession of a schedule I controlled substance. On appeal, defendant argues that the trial court erred in denying her motion to suppress evidence obtained as a result of a warrantless search of her residence. Defendant contends that the trial court's findings are insufficient to support its conclusion that the officers had an objectively reasonable belief that a breaking and entering was in progress or had recently been committed and that, therefore, the search

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was justified under the exigent circumstances exception to the warrant requirement. We agree.

The trial court's findings that the officers observed a broken window, that the front door was unlocked, and that no one responded when the officers knocked on the door are insufficient to show that they had an objectively reasonable belief that a breaking and entering had *recently* taken place or *was still in progress*, such that there existed an urgent need to enter the property. Accordingly, we hold that the trial court erred in denying the motion to suppress and vacate the judgment.

Facts

At the suppression hearing, the State presented evidence tending to show the following facts. On 15 April 2011 at around 11:40 a.m., Officer Adam Wolf of the Garner Police Department ("GPD") was driving through the Bryan Woods apartment complex in Garner, North Carolina, when he saw a dog roaming around with no owner in sight. When he stopped his patrol car and attempted to catch the dog, he noticed what he testified he believed to be curtains waving through an open window on the first floor of one of the apartment buildings. He approached the window, and from 10 to 15 feet away from the window he observed that the window was broken, there were glass shards on the ground, and a screen was propped up against the side of the apartment building. He believed that a breaking and entering could be in progress and called for back-up.

Shortly thereafter, Officer Doak of the GPD arrived and proceeded to the door of the apartment. Officer Doak told Officer Wolf that the door was unlocked. The officers knocked on the door and announced their presence as police officers. The fact that the door was unlocked increased their suspicions that something was "not right" and that a potential breaking and entering could be in progress. The officers were concerned that a suspect could still be inside the apartment. The officers opened the door slightly, again announced their presence, and waited for approximately one minute. When there was still no response, the officers, who by that time were joined by Detective Moore of the GPD, entered the apartment to do a protective sweep.

The purpose of the sweep was to determine whether someone was hiding in the apartment and whether they had interrupted a crime in progress. The officers completed an initial sweep of the apartment from the front to the back, and then a secondary sweep of the apartment from the back of the apartment to the front. At one point during the sweep, the officers came to a room where the door leading to the room was blocked

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by a heavy object. The officers pushed the door open and knocked over a dresser that was blocking their entry. Once inside the room, the officers saw narcotics and other drug paraphernalia in plain view.

After the officers completed the protective sweep and exited the apartment, defendant pulled up to the apartment with her boyfriend James Chance. Defendant and Mr. Chance told the officers that they lived in the apartment. The officers explained that they believed that a break-in could be in progress or that someone had broken in and asked defendant and Mr. Chance to check and see if anything was missing or out of place. Defendant and Mr. Chance went into their living room and said that everything was fine without checking any other room. Based on the officers' observations of drug paraphernalia and narcotics in the apartment, the officers then proceeded to obtain a search warrant for the apartment.

Detective Moore returned with a search warrant several hours later. Pursuant to the search warrant, the officers found what they believed to be 3, 4-methylenedioxymethamphetamine ("MDMA") inside a vase in the common area of the apartment. They also found marijuana, digital scales, and a marijuana blunt. Defendant and Mr. Chance were arrested following the search.

On 9 August 2011, in case file number 11 CRS 208687, defendant was indicted on charges of trafficking in MDMA by possession, possession with intent to sell and deliver marijuana, and maintaining a dwelling used for keeping and selling a controlled substance. On 29 November 2011, in case file number 11 CRS 208689, defendant was indicted on charges of misdemeanor possession of marijuana, possession of drug paraphernalia and misdemeanor child abuse.

Defendant moved to suppress the evidence obtained as a result of the search of her residence. A hearing on defendant's motion was held on 4 June 2013 before Judge Howard E. Manning, Jr. At the hearing, defendant submitted into evidence a map of the layout of Bryan Woods Apartments. The map showed that directly across the street from defendant's apartment are tennis courts and diagonally across the street from the apartment is a swimming pool, clubhouse, and the apartment complex office. On cross-examination, Officer Wolf admitted that he had not heard any screams or cries for help coming from the apartment and that there were no reports of any burglaries in the area. Officer Wolf also admitted that he did not take any steps to further investigate the broken window or contact the apartment manager prior to entering defendant's apartment.

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Bernard Clark, an investigator with the Wake County Public Defender's Office who was previously employed by the New York City Police Department for 29 years, testified for the defense. Mr. Clark testified that he went to the apartment complex and spoke to the property manager, who told him that the window had been broken by defendant's boyfriend after he and defendant had locked themselves out of the apartment. The window had not yet been fixed because the apartment complex wanted Mr. Chance to pay for it. Mr. Clark further testified that in his opinion, defendant's apartment was an odd location for a break-in because it was located in a heavy traffic area and was in plain view of the office, pool, tennis courts, and main road of the complex.

At the close of the hearing, Judge Manning orally rendered his ruling. He rejected the State's contention that exigent circumstances existed based on the possibility that a person within the house could be in need of immediate aid. He stated: "I don't view this situation as falling under the helping somebody in the house, somebody might be hurt, somebody might be beat up. There's nothing here that causes me to think somebody was dead, tied up, stuffed in the closet or anything else."

However, Judge Manning concluded that exigent circumstances existed based upon the officer's reasonable belief that there was a breaking and entering in progress. Judge Manning explained:

In this case, what is important to me, looking at it objectively, is that the officer saw the window open, the screen on the ground, called for backup. The door was open. The door was not locked.

At that point, you got two things that tell me that something's going on – could be going on inside. And then when you ask if anybody is in there and didn't hear anything, I think they had a right to go in and make a sweep.

Accordingly, Judge Manning denied the motion to suppress.

After the suppression hearing, the substance originally thought by the officers to be MDMA was subsequently identified as N-Benzylpiperazine ("BZP") by the laboratory. On 3 December 2013, a superseding indictment was issued in 11 CRS 208687 that charged defendant with possession with intent to sell and deliver BZP, possession with intent to sell or deliver marijuana, and maintaining a dwelling used for keeping or selling controlled substances.

At a hearing held before Judge Carl R. Fox on 25 February 2014, defendant entered a negotiated plea of guilty to one count of felony

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possession of a schedule I controlled substance in 11 CRS 208687 and one count of misdemeanor child abuse in 11 CRS 208689. The remaining charges were dismissed.

In 11 CRS 208689, the trial court entered judgment on defendant's guilty plea to misdemeanor child abuse, sentenced defendant to 75 days of imprisonment, suspended the sentence, and placed defendant on supervised probation for 12 months. In 11 CRS 208687, the trial court entered a conditional discharge of the possession of a controlled substance offense pursuant to N.C. Gen. Stat. § 90-96(a), deferred further proceedings in the matter, and placed defendant on supervised probation for 12 months. Defendant gave oral notice of appeal. On 18 April 2014, Judge Manning entered a written order denying defendant's motion to suppress.

Discussion

Initially, we note that although the written order denying defendant's motion to suppress was entered after defendant orally appealed the denial of her motion to suppress, the trial court had jurisdiction to enter the written order, and it is properly before this Court. As explained by this Court in *State v. Price*, ___ N.C. App. ___, ___, 757 S.E.2d 309, 312, *disc. review denied*, 367 N.C. 508, 759 S.E.2d 90 (2014):

N.C. Gen. Stat. § 15A-1448(a) sets forth the guidelines for time for entry of an appeal and jurisdiction over a case. Under N.C. Gen. Stat. § 15A-1448(a)(3), “[t]he jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given and the period described in [N.C.G.S. § 15A1448(a)(1)-(2) [sic]] . . . has expired.” Subsection (1) of N.C. Gen. Stat. § 15A-1448(a) provides that “[a] case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal.” *Id.* § 15A-1448(a)(1).

Rule 4 of the Rules of Appellate Procedure, in turn, provides for two modes of appeal in a criminal case: (1) A party may give oral notice of appeal at the time of trial or of the pretrial hearing, or (2) “notice of appeal may be in writing and ‘filed with the clerk of court . . . at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order.’ ” *Price*, ___ N.C. App. at ___, 757 S.E.2d at 312 (quoting *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012)). Consequently, the period for giving notice of

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appeal expires – and the trial court’s jurisdiction over the case divests – 14 days after entry of a written order.

With respect to the denial of a motion to suppress, N.C. Gen. Stat. § 15A-979(b) (2013) provides that “[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.” Pursuant to this statute, “ ‘a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty.’ ” *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 193 (2001) (quoting *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff’d per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996)). In this case, defendant notified the State of her intention to appeal the denial of her suppression motion and then orally appealed the judgment entered upon her plea of guilty.

Although defendant properly appealed the denial of her suppression motion, the trial court retained jurisdiction to enter a written order. Accordingly, we hold that the written suppression order is properly before this Court. *See Price*, ___ N.C. App. at ___, 757 S.E.2d at 315 (holding trial court had jurisdiction to enter written suppression order after the State gave oral notice of appeal from trial court’s ruling stated in open court, and reviewing written suppression order). *Cf. Oates*, 366 N.C. at 268, 732 S.E.2d at 575 (holding timely State’s written notice of appeal filed after oral rendition of ruling even though State did not file additional written notice of appeal after entry of written order).

Motion to Suppress

On appeal, defendant argues that the trial court erred in denying her motion to suppress the evidence obtained as a result of the warrantless search of her residence. Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “The trial court’s conclusions of law . . . are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Defendant contends that the trial court erred in concluding that the warrantless entry into her apartment was justified by exigent circumstances. “In order to justify a warrantless entry of a residence, there

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must be probable cause and exigent circumstances which would warrant an exception to the warrant requirement.” *State v. Wallace*, 111 N.C. App. 581, 586, 433 S.E.2d 238, 241 (1993).

With respect to exigent circumstances, this Court has explained:

Exigent circumstances exist when there is “[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures[.]” *Black’s Law Dictionary* 236 (7th ed. 1999); see also Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 49 (2d ed. 1992) (stating that exigent circumstances exist when immediate action is necessary). “If the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible” *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979). The United States Supreme Court has approved the following exigent circumstances justifying warrantless searches and seizures: (1) where law enforcement officers are in “hot pursuit” of a suspect, see, e.g., *State v. Santana*, 427 U.S. 38, 42-43, 49 L. Ed. 2d 300, 305[, 96 S. Ct. 2406, 2409-10] (1976); (2) where there is immediate and present danger to the public or to law enforcement officers, see, e.g., *Warden v. Hayden*, 387 U.S. 294, 298-99, 18 L. Ed. 2d 782, 787[, 87 S. Ct. 1642, 1645-46] (1967); (3) where destruction of evidence is imminent, see, e.g., *Santana*, 427 U.S. at 43, 49 L. Ed. 2d at 305[, 96 S. Ct. at 2410]; and (4) where the gravity of the offense for which the suspect is arrested is high, see, e.g., *Welsh v. Wisconsin*, 466 U.S. 740, 753, 80 L. Ed. 2d 732, 745[, 104 S. Ct. 2091, 2099] (1984). These cases suggest that exigent circumstances exist where the need for immediate action is so great as to outweigh the potential infringement of a defendant’s rights under the Fourth Amendment, thereby justifying the officers’ failure to obtain a warrant.

State v. Nance, 149 N.C. App. 734, 743-44, 562 S.E.2d 557, 563-64 (2002).

In *State v. Woods*, 136 N.C. App. 386, 391, 524 S.E.2d 363, 366 (2000), this Court recognized that “State and federal courts in other jurisdictions generally agree that where an officer reasonably believes that a burglary is in progress or has been recently committed, a warrantless entry of a private residence to ascertain whether the intruder is within or there are people in need of assistance does not offend the Fourth

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Amendment.” In *Woods*, an officer was dispatched to the defendant’s mobile home to investigate an alarm that was going off. *Id.* at 388, 524 S.E.2d at 364. When the officer arrived, he heard the alarm and observed that the rear door of the mobile home was ajar. *Id.* He announced his presence, identified himself as a police officer, and requested that anyone inside exit the residence. *Id.* When he heard no response, he entered the mobile home to search for potential victims or perpetrators. *Id.* A cursory search of the home revealed that a window had been broken. *Id.* Under these circumstances, the Court held that the entry into the defendant’s home was supported by both probable cause and exigent circumstances, as “[i]t was clear an uninvited entry had been made at the residence and the officers had reason to believe that intruders or victims could still be on the premises.” *Id.* at 392, 524 S.E.2d at 366.

Similarly, in *State v. Miller*, __ N.C. App. __, __, 746 S.E.2d 421, 425 (2013), *rev’d on other grounds*, 367 N.C. 702, 766 S.E.2d 289 (2014), this Court held that the officers’ warrantless entry into the defendant’s home was justified based on the exigent circumstances exception because the officers “had an objective reasonable belief that a burglary or breaking and entering was in process and that a suspect or suspects may still be in defendant’s home.” In that case, the officer had received a burglar alarm report concerning a suspected breaking and entering at the defendant’s home, and when the officer arrived, he noticed a back window was broken. *Id.* at __, 746 S.E.2d at 425. This Court noted that “because all the doors remained locked, [the officer] reasonably believed that the intruder could have still been in the home.” *Id.* at __, 746 S.E.2d at 425.

In this case, the trial court found that “Officer Wolfe [sic] observed a broken window, the window’s screen leaning up against the apartment building, glass on the ground directly below the window, an unlocked front door of the apartment and no response from inside the apartment when officers knocked and announced their presence.” Defendant does not dispute these findings and, therefore, they are binding on appeal. *State v. Ballance*, 218 N.C. App. 202, 214, 720 S.E.2d 856, 865 (2012). The dispositive issue, therefore, is whether these findings are sufficient to support a conclusion that the officers had an objectively reasonable belief that a breaking and entering was in progress or had been recently committed.

Defendant argues, and we agree, that the facts of this case are distinguishable from the facts in *Woods* and *Miller*. In each of those cases, the officers were specifically dispatched to investigate reports of an alarm sounding at the defendants’ residences. The officers’ subsequent discovery of a broken window and door left ajar in those cases confirmed what

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the officers had already suspected – that a burglary had recently taken place. Here, in contrast, there was no alarm, and the officers were not called to the location to investigate a suspected burglary. Rather, Officer Wolf just happened upon the broken window of the apartment while he was on patrol in the middle of the day. Absent an alarm or additional information provided in a dispatch, there is no indication of how or when the window was broken.

In *State v. Morgavi*, 58 Wash. App. 733, 794 P.2d 1289 (1990), the Washington Court of Appeals drew a similar distinction. In that case, the court held that entry into the defendant's residence was not justified under the exigent circumstances exception where "[t]he facts that led the officers to believe that a burglary was in progress or had recently taken place consisted of the presence of a car in front of the garage, opened and partially broken doors to the garage, an open back door to the house and an open side door to the garage." *Id.* at 739, 794 P.2d at 1292. The court explained:

These observations, while perhaps enough to raise suspicions, were not enough to support a reasonable belief that a crime had occurred or was occurring on the premises. Indeed, these observations were consistent with any number of innocent explanations. These facts are distinguishable from those in [*State v.*] *Campbell*[, 15 Wash. App. 98, 547 P.2d 295 (1976)] and [*State v.*] *Bakke*[, 44 Wash. App. 830, 723 P.2d 534 (1986)] in a significant aspect. In each of those cases, the police were summoned to the premises by concerned neighbors who had witnessed the burglaries and the flight of suspects. In both of those cases the police officers were not following their own hunch that a crime had occurred, but rather, were responding to the report of a third party who had actually witnessed the crime.

Id., 794 P.2d at 1292-93. The court acknowledged that when officers are dispatched to a location based upon a report of a crime taking place, "the police clearly ha[ve] a reason to investigate what ha[s] been described as an emergency." *Id.* at 740, 794 P.2d at 1293. In contrast, where the officers merely had a "hunch" that a crime had occurred, "the emergency was not apparent." *Id.* at 739, 740, 794 P.2d at 1293.

In this case, even assuming that the broken window gave the officers probable cause to believe that a burglary had been committed, there is no evidence that the burglary had been committed recently or that it was on-going. Indeed, in *Miller*, the Court recognized that the locked door

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suggested that the perpetrator was still inside. It stands to reason that the unlocked door in this case suggests that any perpetrator who may have gained entry to defendant's apartment through the broken window had already left through the front door.

Officer Wolf acknowledged at the hearing that he did not know when the window was broken, and there is no evidence suggesting that it had been broken recently. Aside from the broken window, the officers had no reason to believe that there was an urgent need to enter the property. *See State v. Simmons*, 158 S.W.3d 901, 907 (Mo. Ct. App. 2005) (holding that although it may have been reasonable for officer to suspect that a burglary had occurred "at some point," there was nothing to indicate that exigent circumstances existed where officer "neither saw nor heard anyone in or about the building before his entry" and there was no evidence presented "regarding how long the open door and broken window conditions had existed").

The State also argues that exigent circumstances existed based upon the possibility that a victim could have been inside and in need of aid. The trial court, however, orally rejected that contention and did not include that justification in its findings of fact or conclusions of law, and the State does not specifically contend in its brief that the trial court deprived it of an alternative basis to uphold the order. *See N.C.R. App. P. 28(c)* ("Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."). In any event, none of the trial court's findings supports a conclusion that it was reasonable for the officers to believe that there was someone inside the apartment in need of immediate assistance. As stated by the Tenth Circuit, "[t]he sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid – such a 'possibility' is ever-present." *United States v. Martinez*, 643 F.3d 1292, 1299-300 (10th Cir. 2011).

Morgavi, *Simmons*, and *Martinez* are consistent with this Court's recognition that "exigent circumstances exist where the need for immediate action is so great as to outweigh the potential infringement of a defendant's rights under the Fourth Amendment, thereby justifying the officers' failure to obtain a warrant." *Nance*, 149 N.C. App. at 743-44, 562 S.E.2d at 564. In this case, the only circumstances justifying the officers' entry into defendant's residence were a broken window, an unlocked door, and the lack of response to the officers' knock at the door. We

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hold that although these findings may be sufficient to give the officers a reasonable belief that an illegal entry had occurred *at some point*, they are insufficient to give the officers an objectively reasonable belief that a breaking and entering was in progress or had occurred recently.

Additionally, we note that the evidence is undisputed that (1) Officer Wolf discovered the broken window in the middle of the day in broad daylight, (2) defendant's apartment is located in a heavy traffic area of the apartment complex, and (3) the broken window was plainly visible from the tennis courts, pool, club house, and main road of the complex. The time of day, the location of the broken window, and the visibility of the supposed entrance point for any break-in are all circumstances relevant to the question whether it was reasonable for the officers to believe that a break in had recently taken place or was ongoing. However, we need not remand for further findings of fact in light of our holding that the trial court's findings are insufficient to support its conclusion of law that the officers' initial entry into defendant's apartment was justified under the exigent circumstances exception to the warrant requirement.

In sum, we hold that the trial court erred by denying defendant's motion to suppress. "When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). Since the police obtained a warrant to search the apartment based upon evidence discovered during the illegal warrantless search, any evidence obtained pursuant to the search warrant is the fruit of the illegal search and should be suppressed. Accordingly, we reverse the suppression order and vacate the judgment entered on defendant's guilty plea.

We note that defendant's brief originally presented a second issue as an alternative basis for relief. In the second issue presented on appeal, defendant argued that the trial court lacked jurisdiction to indict defendant for possession of BZP because on 15 April 2011, the alleged date of offense, BZP was not included in the list of schedule I controlled substances contained in N.C. Gen. Stat. § 90-89 (2013). BZP was not added to the list as a controlled substance until 27 June 2011. *See* 2011 N.C. Sess. Law 326 § 14.(b). Therefore, defendant argued, defendant's plea agreement should be vacated.

We need not address this issue. On 23 February 2015, while this appeal was pending before this Court, the felony possession of a schedule I controlled substance charge in 11 CRS 208687 was dismissed pursuant to defendant's successful completion of the terms of her conditional

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discharge. Subsequently, defendant moved to amend her brief to withdraw her challenge to the indictment in 11 CRS 208687 as a basis for relief. We have decided in our discretion to grant defendant's motion.

REVERSED.

Judges ELMORE and INMAN concur.

STATE OF NORTH CAROLINA
v.
ZACHARY DAVID THOMSEN

No. COA14-1235

Filed 4 August 2015

1. Appeal and Error—jurisdiction—writ of certiorari—sua sponte order granting motion for appropriate relief—bound by petition panel

The Court of Appeals had jurisdiction to review the trial court's sua sponte order granting defendant appropriate relief via writ of certiorari. The motion for appropriate relief statute addressed by the Supreme Court in *Stubbs*, ___ N.C. ___ (2015), was not instructive and absent direction otherwise the Court of Appeals was bound by the decision of the petition panel in this case.

2. Evidence—findings of fact—abuse of discretion—not considered in analysis

The trial court abused its discretion in a first-degree rape and first-degree sexual offense case by its findings of fact # 21 and # 23 discussing the victim's prior abuse, finding of fact # 77 discussing the victim's lack of "adult supervision," statutory mitigating factor 8(b) indicating the relationship between defendant and the victim was otherwise extenuating; and non-statutory mitigating factor 21(b) discussing the victim's lack of "adult supervision." These findings of fact were not considered in the Court of Appeals' analysis of defendant's Eighth Amendment claim.

3. Sentencing—300 months—not grossly disproportionate to crimes pled guilty—no 8th Amendment violation

The Court of Appeals followed its precedent in a first-degree rape and first-degree sexual offense case and held that the original

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300-month sentence imposed by the trial court did not violate the Eighth Amendment. A 300-month sentence was not grossly disproportionate to the two crimes to which defendant pled guilty. Furthermore, Defendant's 300-month sentence was less than or equal to the sentences of many other offenders of the same crime in this jurisdiction.

McGEE, Chief Judge, dissenting.

Appeal by the State from an Order Granting Appropriate Relief entered on 13 December 2013 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 6 April 2015.

Attorney General Roy Cooper, by Anne M. Middleton, Assistant Attorney General, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for the Defendant.

HUNTER, JR., Robert N., Judge.

The State appeals from a *sua sponte* order of the trial court granting Zachary David Thomsen ("Defendant") appropriate relief pursuant to N.C. Gen. Stat. § 15A-1420(d). The State argues the trial court erred in allowing its own motion for appropriate relief on Eighth Amendment grounds. Defendant argues this Court lacks jurisdiction to hear the case via a writ of *certiorari*, and even if this Court does have jurisdiction, the trial court did not abuse its discretion in granting Defendant appropriate relief.

For the following reasons, we vacate the trial court's order granting appropriate relief and the corresponding judgments and commitments, and remand for a new sentencing hearing.

I. Factual & Procedural History

On 11 June 2012, Defendant was indicted for statutory rape of a child less than thirteen years old, statutory sexual offense with a child less than thirteen years old, two counts of taking indecent liberties with a child, and two counts of sexual battery. At the time of the crimes for which Defendant was indicted, he was eighteen years old.

On 3 June 2013, pursuant to a plea agreement, Defendant entered a plea of guilty to first degree rape and first degree sexual offense. Under the terms of the plea agreement, the sentences for those two offenses

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were to be consolidated into one active sentence of 300 months minimum and 372 months maximum. In accordance with the plea agreement, the State agreed to dismiss the two indecent liberties charges and two sexual battery charges. The trial court administered the plea colloquy, and the State presented the factual basis for the plea. The evidence presented to the trial court tended to show the following facts:

At the time of the charged offenses, Defendant was working at Chick-fil-a and living in the home of his father, Brian Thomsen, and his father's fiancé, Violet James ("Ms. James").¹ The victim, Natalie James,² is Ms. James' eight-year-old daughter. On 31 May 2012, Ms. James was out of town, so Defendant picked up Natalie from school. Defendant took Natalie to the Chick-fil-a where he worked, then he took her to their shared home. Defendant and Natalie were at home by themselves. They played outside with a water gun and Defendant began tickling Natalie. He then brought Natalie into her bedroom and raped her vaginally and anally. Natalie told Defendant to stop, but he was too strong and overpowered her. The next day, on 1 June 2012, when Ms. James returned home, Natalie told her mother what happened. Natalie disclosed to Ms. James, and later to police, that Defendant raped her both anally and vaginally on several occasions. Ms. James immediately reported the incident to the Whispering Pines Police Department. Later, during her interview with police, Ms. James recalled that Natalie had some bleeding in her stool since December of 2011, and had several urinary tract infections during the same time period. Defendant was arrested on 1 June 2012. He admitted to the events of 31 May 2012 while he was in custody.

After the State presented the factual basis for the plea, the trial judge James M. Webb questioned Ms. James about Natalie's medical treatment before and after the 31 May 2012 rape, particularly regarding the treatment Ms. James sought for Natalie's prior urinary tract infections. Judge Webb then announced his belief that the proposed 300-month sentence was in the aggravated sentencing range. He identified the 300-month sentence as "the most that [Defendant] could receive" and refused to accept the agreed-upon sentence. Both the prosecutor and the Defendant's attorney disagreed with Judge Webb, stating in fact the first-degree rape charge to which Defendant pled guilty carried a 300-month mandatory minimum sentence. Judge Webb held the matter open to study the sentencing statutes.

1. Violet James is a pseudonym used to protect the identity of Ms. James' minor daughter.

2. Natalie James is a pseudonym used to protect the identity of the minor child.

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Three days later, on 6 June 2013, the trial court reconvened Defendant's plea hearing. Judge Webb ordered a presentence study of Defendant by the Department of Corrections, to gauge Defendant's mental, emotional, and physical health, and to determine whether Defendant is a sexually violent predator. The plea hearing resumed on 17 October 2013. The hearing began with further *sua sponte* questioning of Ms. James by Judge Webb. Ms. James testified that Defendant was the oldest child living in the home, and supervising the younger children was an "assumed task" for Defendant. Judge Webb then shifted his questioning of Ms. James to an incident approximately five years prior, when Natalie was three years old and was allegedly inappropriately touched by a thirteen-year-old boy who was the son of Natalie's caregiver. Judge Webb asked Ms. James about the extent of the prior abuse, and Ms. James responded adversely to this questioning, asking: "Why [do] we have to bring this up?" and "Why do we have to talk about this, sir?" and "Why is this important, sir?" Eventually, Ms. James testified that the prior abuse of Natalie was "some touching . . . on the outside of her clothing" which Natalie reported to Ms. James immediately and Ms. James reported to the alleged perpetrator's parent and to the Fayetteville Police Department.

After Judge Webb finished questioning Ms. James, the State called Dr. Molly Berkoff, the pediatrician who examined Natalie after the 31 May 2012 rape. Dr. Berkoff testified that she examined Natalie on 22 June 2012. She stated "[t]here was nothing remarkable" about Natalie's examination, which she testified "is not unusual in cases of non-acute sexual abuse[.]" By "non-acute sexual abuse," Dr. Berkoff meant sexual abuse occurring more than 96 hours before the time of examination. She testified that, although Natalie's hymen was intact at the time of her examination, "children can have completely unremarkable exams despite having significant penetration or repeated episodes of trauma."

When the State finished presenting its evidence, Judge Webb further questioned both Dr. Berkoff and the investigating officer, Lieutenant Rodney Dozier, of the Whispering Pines Police Department. After hearing their testimony, Judge Webb decided to continue the matter until 11 December 2013.

On 13 December 2013, the case was recalled in front of Judge Webb. Judge Webb made the following relevant findings of mitigating factors, corresponding with the numbering on the felony judgment worksheet:

4(a), The defendant['s] age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

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8(b), The relationship between the defendant and the victim was otherwise extenuating.

....

And 21, additional written findings of factors in mitigation:

a. That in August, 2010 Brian Lawrence Thomsen, father of the defendant, and [Ms. James] commenced cohabitation at [Ms. James'] Whispering Pines, NC, residence along with [Ms. James'] two minor children and Mr. Thomsen's three minor children, including the defendant and the victim.

b. That on May 31st, 2012 [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged defendant without responsible adult supervision.

c. That Dr. Molly Berkoff, a pediatrician and the medical director for the Child Evaluation Clinic of the UNC Hospitals reviewed the victim's June 2nd, 2012 physical examination at the UNC Hospitals emergency room conducted by a sexual assault nurse examiner within 48 hours of the incident, and conducted her own physical examination of the victim on June 22nd, 2012 and concluded that neither examination either proved nor disproved the reported misconduct.

d. That Dr. Berkoff noted the emergency department documented redness and a deep V shape to the victim's hymen which the medical field does not characterize as being definitive evidence of penetration trauma, but rather simply a description of the way the victim's hymen looks and does not prove or disprove the allegations of sexual abuse.

e. That the victim's hymen was present.

f. That the victim's anal exam showed "no lesions, no discharge, no scarring".

g. That the Static 99-R places the defendant in the moderate-low risk category for being charged or convicted of another sexual offense.

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h. That the unanimous opinion of the board of experts of the sexually violent predator panel is that the defendant does not meet the criteria to be designated a sexually violent predator pursuant to North Carolina law.

i. That the defendant participated in Junior Reserve Officer Training Corps (JROTC) while attending high school.

After announcing the findings in mitigation, Judge Webb accepted the sentence agreed upon by the State and Defendant, stating “[i]t’s the judgment of the Court that the defendant is to be confined for a minimum of 300 months and a maximum of 420 months in the State Department of Adult Correction.” Judge Webb then stated in open court, “[t]he Court sua sponte enters an order granting appropriate relief,” and proceeded to read aloud a written order, which included the following relevant findings of fact:

1. That on June 3rd, 2013 the Defendant, while represented by Moore County Attorney Bruce Cunningham, pled guilty to Rape of a Child, a B1 felony, and Sexual Offense of a Child, also a B1 felony, in violation of G.S. 14-27.2A and G.S. 14-27.4A respectively;

....

4. That pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), the statutory mandatory minimum sentence for the offenses for which the Defendant pled guilty to is confinement for a minimum of 300 months (25 years) and a maximum of 420 months (35 years);

....

21. That when the victim was 3 years of age she immediately reported to her mother that she was touched inappropriately by the 13 year old son of the owner/operator of an in home licensed day care located in Fayetteville, N.C.;

22. That while [Ms. James] reported this incident to the Fayetteville Police Department, no one was ever prosecuted;

23. That despite this unfortunate incident, referenced in the Child Medical Evaluation of the UNC School of Medicine conducted on June 22, 2012, [Ms. James] and

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Brian Thomsen allowed the minor child to be in the custody of the teenaged Defendant without responsible adult supervision;

....

77. That the Defendant's paternal grandfather in his returned questionnaire correctly and accurately attributes the Defendant's criminal behavior to being left alone in the home with a child without adult supervision;

78. That the following two cases are instructive and insightful;

79. That on June 8th, 2009 the Moore County Grand Jury returned a true bill of indictment in case # 09 CRS 52230 indicting Randy Martin Baughn with the first degree murder of his wife, Abigail Baughn;

80. That on November 7th, 2012 the Moore County District Attorney and Defendant Baughn . . . entered into a plea arrangement wherein Defendant Baughn was to plead guilty to second degree murder, a B2 Felony and receive an active sentence from the mitigated range of punishments of 94 months (7.83 years) minimum to 122 months (10.16 years) maximum;

....

86. That on February 2nd, 2012 the Guilford County Grand Jury in Guilford County case numbered 11 CRS 94622, indicted 32 year old Fernando Santana for the First Degree Murder of Daniel Corey Jones on November 28th, 2011;

....

88. That Defendant Santana pled guilty to Second Degree Murder and pursuant to the plea arrangement was sentenced to an active sentence from the aggravated range of punishments to a minimum of 292 months (24.3 years) and a maximum of 360 months (30 years) as a prior record level 4;

....

91. That it is unconsciousable [sic] that teenaged Defendant Thomsen under the facts and circumstances of this case

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should be required to serve a mandatory active sentence in the North Carolina Department of Adult Correction of a minimum of 25 years and a maximum of 35 years.

In accordance with the findings of fact, Judge Webb made the following conclusions of law:

1. That the Defendant's sentence pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), of confinement for a minimum of 300 months (25 years) and a maximum of 420 months (35 years) is grossly disproportionate when compared with the mitigating factors found at sentencing and the facts and unusual circumstances surrounding the crimes committed;
2. That the mandatory sentencing provisions of G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), as applied to the facts and circumstances of this case are in violation of the Defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and constitute cruel and unusual punishment and a denial of due process of law; and
3. That the Defendant's sentence imposed this date pursuant to the plea arrangement and pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f) should be vacated.

After reading the order aloud, and vacating the previously imposed sentence, Judge Webb ordered: "It's the judgment of the Court he's to be confined for a minimum of 144 months," and a maximum of 233 months in the State Department of Adult Correction. Judge Webb signed a new judgment to that effect. The State noted its objection to the court's *sua sponte* motion for appropriate relief.

On 21 March 2014, the State filed a petition for writ of *certiorari* with this Court to review Judge Webb's 13 December 2013 order granting Defendant appropriate relief. On 3 April 2014, Defendant filed a response opposing the State's petition for writ of *certiorari*, arguing this Court lacks jurisdiction to hear the case via writ of *certiorari*. On 10 April 2014 a panel of this Court granted the State's petition for writ of *certiorari*. The State filed its Record on Appeal on 17 November 2014, and both parties submitted their briefs to this Court. In his brief, Defendant restated his argument that this Court lacks jurisdiction to hear this case. The case was set to be heard on 6 April 2015.

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On 24 February 2015, Defendant submitted to this Court a Motion to Hold Appeal in Abeyance Pending Determination of *State v. Stubbs* by the North Carolina Supreme Court. *Stubbs* was heard in the North Carolina Supreme Court on 13 January 2015. In his motion, Defendant contended *Stubbs* will resolve the issue of whether the Court of Appeals has jurisdiction to review an order of the trial court granting appropriate relief via writ of *certiorari*. On 9 March 2015, the State filed a response, opposing Defendant's motion to hold the appeal in abeyance. On 16 March 2015, we granted Defendant's motion, and ordered the appeal held in abeyance pending the resolution of *State v. Stubbs*.

On 10 April 2015, the Supreme Court issued its opinion in *State v. Stubbs*, 568A03-02. Following this decision we reviewed this case without further briefing from the parties.

II. Jurisdiction

[1] The first issue is whether this Court has jurisdiction to review the trial court's *sua sponte* order granting Defendant appropriate relief via writ of *certiorari*. Because the State did not appeal the trial court's order in this case, the writ of *certiorari* is the only mechanism by which this Court could have jurisdiction.

As an initial matter, we must address whether the issue of jurisdiction is appropriate for this panel's review, given that a prior panel of this Court—the petition panel—allowed the State's petition for writ of *certiorari* on 8 April 2014. The well-settled and often-cited rule of this Court is one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. *See N. Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 563, 299 S.E.2d 629, 630 (1983). However, that rule was recently called into question by this Court in *State v. Stubbs*. In *Stubbs*, two judges stated where subject matter jurisdiction is at issue, the panel should not be compelled to follow the holding of a prior panel. *See State v. Stubbs*, ___ N.C. App. ___, ___, 754 S.E.2d 174, 183, 185 (2014) (Dillon, J., concurring in separate opinion; Stephens, J., dissenting). In her dissent, Judge Stephens pointed out “[i]f a court finds *at any stage of the proceedings* that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction.” *Id.* at ___, 754 S.E.2d at 185 (quoting *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988) (emphasis added)).

Our decision in *State v. Stubbs* was reviewed by the North Carolina Supreme Court based on the dissenting opinion regarding jurisdiction. In

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its opinion, the Supreme Court declined to address the issue of whether this Court is bound by a prior panel where subject matter jurisdiction is in question. Instead, the Supreme Court decided the case on other grounds, and held only

[a]s for whether a second panel of the Court of Appeals can revisit a determination of subject matter jurisdiction after a previous panel has already done so, we simply note that here, both panels did have subject matter jurisdiction.

State v. Stubbs, ___ N.C. ___, ___, 770 S.E.2d 74, 76 (2015).

Although *Stubbs* also dealt with this Court's subject matter jurisdiction to hear the State's appeal of an order granting a defendant's motion for appropriate relief ("MAR") via writ of *certiorari*, the substantive law addressed in *Stubbs* is not relevant to this case. In *Stubbs*, the defendant filed an MAR pursuant to N.C. Gen. Stat. § 15A-1415, alleging his sentence violated the Eighth Amendment of the United States Constitution.³ *Id.* at ___, 770 S.E.2d at 76. The trial court granted the defendant's motion and the State appealed to this Court via writ of *certiorari*. *Id.* at ___, 770 S.E.2d at 75. The Supreme Court held that the "denying" language of Rule 21 of Appellate Procedure⁴ does not divest the Court of Appeals of jurisdiction to review an order of the trial court *granting* an MAR filed pursuant to N.C. Gen. Stat. § 15A-1415 via writ of *certiorari*. *Id.* at ___, 770 S.E.2d at 76. The Court of Appeals has jurisdiction to review the MAR order via writ of *certiorari*, the Supreme Court said, because such jurisdiction is specifically provided for by the legislature in N.C. Gen. Stat. § 15A-1422(c)(3). *Id.*

The rule stated in *Stubbs* is not applicable here because N.C. Gen. Stat. § 15A-1420(d) is benefitted by no similar legislative grant of appellate jurisdiction in this Court. The statute is silent as to either the State's or the defendant's ability to seek appellate review of *sua sponte* MAR orders. Had the Supreme Court in *Stubbs* decided the issue of whether

3. N.C. Gen. Stat. § 15A-1415 allows a noncapital defendant to move for appropriate relief from the judgment against him on a number of enumerated grounds, including an alleged violation of the United States Constitution or the Constitution of North Carolina. See N.C. Gen. Stat. § 15A-1415 (2014).

4. Rule 21 of the North Carolina Rules of Appellate Procedure dictates the circumstances under which the appellate courts may review an order of the trial court via writ of *certiorari*. Prior to the Supreme Court's decision in *Stubbs*, the rule stated in pertinent part "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court . . . for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2014) (emphasis added).

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we are bound by a prior panel of this Court on jurisdictional issues, *Stubbs* would have controlled our decision in this case. Because the MAR statute addressed by the Supreme Court in *Stubbs* is not instructive here, and because—absent direction otherwise—we are bound by the decision of the petition panel in this case, we have jurisdiction to hear this case by the extraordinary writ of *certiorari*.

III. Standard of Review

“When considering rulings on motions for appropriate relief, we review the trial court’s order to determine ‘whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.’” *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). The trial court’s findings of fact “are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions are fully reviewable on appeal.” *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted).

IV. Analysis**A. Findings of Fact**

[2] “Abuse of discretion results where the trial court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Rollins*, ___ N.C. App. ___, ___, 734 S.E.2d 634 (2012) (citation and quotation marks omitted). In this case, the trial court abused its discretion in making the following findings: (1) findings of fact # 21 and # 23 (discussing Natalie’s prior abuse); (2) finding of fact # 77 (discussing Natalie’s lack of “adult supervision”); (3) statutory mitigating factor 8(b) (“The relationship between the defendant and the victim was otherwise extenuating.”); and (4) non-statutory mitigating factor 21 (b) (discussing Natalie’s lack of “adult supervision”).

Findings of fact # 21 and # 23 state:

21. That when the victim was 3 years of age she immediately reported to her mother that she was touched inappropriately by the 13 year old son of the owner/operator of an in home licensed day care located in Fayetteville, N.C.;

....

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23. That despite this unfortunate incident . . . [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged Defendant without responsible adult supervision[.]

Natalie's prior abuse is irrelevant to Defendant's sentencing in this case. Furthermore, the finding that Natalie was "without adult supervision" is wholly unsupported by the facts in the record. The record shows that Defendant *was* the adult in charge of supervising Natalie on the day of the crime. The evidence is uncontroverted that: Defendant was eighteen years old—a legal adult—on the day of the crime; Defendant was gainfully employed at Chick-Fil-A; Defendant had "no prior involvement with the law[;]" Defendant supervised the younger children in the past; Ms. James was out of town on the day of the crime and Defendant was in charge of picking Natalie up from school and bringing her home.

Similarly, finding of fact # 77 states:

77. That the Defendant's paternal grandfather in his returned questionnaire correctly and accurately attributes the Defendant's criminal behavior to being left alone in the home with a child without adult supervision[.]

For the reasons stated above, this finding is manifestly unsupported by reason. Defendant was an eighteen year old *adult* at the time of the crime. Defendant had no prior criminal record and nothing in this record indicates Defendant was prone to this type of criminal behavior when he was left alone with Natalie.

We also find the trial court abused its discretion in two of its findings of mitigating factors, one statutory and one non-statutory. Although "the trial judge has wide latitude in determining the existence of aggravating and mitigating factors," *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988), findings of mitigating factors may be stricken for abuse of discretion. *See State v. Spears*, 314 N.C. 319, 322–23, 333 S.E.2d 242, 244 (1985).

Judge Webb found statutory mitigating factor 8(b): "[t]he relationship between the defendant and the victim was otherwise extenuating." "An extenuating relationship should be found if circumstances show that part of the fault for a crime can be 'morally shifted' from defendant to the victim." *State v. Mixion*, 110 N.C. App. 138, 151, 429 S.E.2d 363, 371 (1993) (citation omitted). Here, it was a manifest abuse of discretion to regard Defendant's role as Natalie's caretaker as an extenuating circumstance warranting sentence mitigation. There is no competent evidence

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in this record tending to show any facts which could reasonably support a finding of an extenuating relationship between Natalie and Defendant.

Finally, Judge Webb found non-statutory mitigating factor 21(b):

b. That on May 31st, 2012 [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teen-aged defendant without responsible adult supervision.

For the reasons stated above, this non-statutory mitigating factor constitutes a manifest abuse of discretion. We therefore will not consider the aforementioned findings of fact in our analysis of Defendant's Eighth Amendment claim.

B. Conclusions of Law: Eighth Amendment

[3] The trial court's conclusions of law are fully reviewable on appeal. *See Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35. We now review the trial court's conclusion that Defendant's 300-month minimum and 420-month maximum sentence violated his rights under the Eighth and Fourteenth Amendments.

The Eighth Amendment applies to the states by virtue of the Fourteenth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991). The Eighth Amendment prohibits cruel and unusual punishment; specifically, it forbids "extreme sentences that are grossly disproportionate to the crime." *Id.* at 1001 (internal quotation marks omitted). To determine whether a sentence for a term of years is grossly disproportionate to a particular crime, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham v. Florida*, 560 U.S. 48, 60 (2010). "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* Our Supreme Court has held "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment[.]" *State v. Ysaquire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983).

In this case, Defendant pled guilty to rape of a child, in violation of N.C. Gen. Stat. § 14-27.2A, and sexual offense with a child, in violation of N.C. Gen. Stat. § 14-27.4A. Each of those crimes carry a mandatory minimum sentence of 300 months imprisonment. *See* N.C. Gen. Stat. § 14-27.2A(b) ("[I]n no case shall the person receive an active punishment of less than 300 months[.]"); N.C. Gen. Stat. § 14-27.4A(b) (same). The

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State and Defendant agreed to a consolidated minimum sentence of 300 months' imprisonment. A 300-month sentence is not grossly disproportionate to the two crimes to which Defendant pled guilty. Furthermore, Defendant's 300-month sentence in this case is less than or equal to the sentences of many other offenders of the same crime in this jurisdiction. *See State v. Agustin*, ___ N.C. App. ___, 747 S.E.2d 316 (2013) (holding sentence of 300 to 369 months' imprisonment was appropriate for rape of a child); *State v. Bailey*, 163 N.C. App. 84, 592 S.E.2d 738 (2004) (holding consecutive prison terms of 300 to 369 months for first-degree rape was not unconstitutional); *State v. Stallings*, 107 N.C. App. 241, 419 S.E.2d 586 (1992) (holding life sentence for first-degree sexual offense was not cruel and unusual punishment); *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585 (1990) (holding sentence of life imprisonment for first-degree rape was not unconstitutional).

We are unpersuaded by the trial court's comparison of the sentence imposed in this case with the sentences imposed in other, unrelated, second-degree murder cases. We follow our precedent, holding the original 300-month sentence imposed by the trial court does not violate the Eighth Amendment.

V. Conclusion

For the foregoing reasons, we vacate the 13 December 2013 order of the trial court granting Defendant appropriate relief and the corresponding judgments and commitments. We remand for a new sentencing hearing.

VACATED AND REMANDED.

Judge Dietz concurs.

Chief Judge McGee dissents in a separate opinion.

McGEE, Chief Judge, dissenting.

Because I do not believe the State had authority to seek review of the trial court's *sua sponte* grant of its MAR, I dissent.

I. In re Civil Penalty

The majority opinion holds that we are bound by this Court's prior ruling granting the State's petition for writ of *certiorari*, pursuant to *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). I disagree.

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This Court has held:

A judgment or order that is void, as opposed to voidable, is subject to collateral attack. *See Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 24 (1925) (holding that void judgments “yield to collateral attack, but [voidable judgments] never yield to a collateral attack . . .”). A lack of subject matter jurisdiction renders the judgment or order void. *See Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 425, 557 S.E.2d 104, 108 (2001) (“‘A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted, without any special plea.’”

In re Webber, 201 N.C. App. 212, 220, 689 S.E.2d 468, 474-75 (2009) (citation omitted). I do not believe *In re Civil Penalty* serves to prevent this panel from addressing the issue of subject matter jurisdiction. I concur with the analyses of Judge Stephens and Judge Dillon concerning this issue in *State v. Stubbs*. *State v. Stubbs*, __ N.C. App. __, __, and __, 754 S.E.2d 174, 182 and 184-85 (2014) (“*Stubbs I*”).

Two of the three judges in *Stubbs I* agreed that this Court is not bound by the prior rulings of this Court when the issue is lack of subject matter jurisdiction. *Stubbs I*, __ N.C. App. at __ and __, 754 S.E.2d at 182 and 185; *see also State v. Stubbs*, __ N.C. __, __, 770 S.E.2d 74, 75 (2015) (“*Stubbs II*”) (“The concurring and dissenting opinions disagreed with the lead opinion on that point, believing that each panel of the Court of Appeals has the authority and ability to address subject matter jurisdiction anew.”). Because our Supreme Court did not rule on the jurisdictional issue raised in *Stubbs II* related to *In re Civil Penalty* – whether this Court can address lack of subject matter jurisdiction if a prior panel of this Court has already purported to grant *certiorari* in the same matter – the majority decision of this Court in *Stubbs I*, as related to jurisdiction, has not been overruled and informs my position on this issue. I do not believe we are bound by the actions of the prior panel granting *certiorari* in this matter, as I find that the prior panel lacked jurisdiction to enter that order, and it is therefore a nullity, of no effect, and subject to collateral attack at any time. *Webber*, 201 N.C. App. at 220, 689 S.E.2d at 474-75.

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*II. N.C. Gen. Stat. § 15A-1422 and the State's Right to Certiorari**A.*

The trial court *sua sponte* granted its own MAR in this matter. Trial courts have this authority pursuant to N.C. Gen. Stat. § 15A-1420(d), which states: “**Action on Court’s Own Motion.** – At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion.” N.C. Gen. Stat. § 15A-1420(d) (2013). This Court possesses only that authority granted it by statute to review actions of the trial court.

The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: “The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.” N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals “has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice.” N.C.G.S. § 7A-32(c) (2014). *More specifically, and also relevant here, the General Assembly has specified when appeals relating to MARs may be taken[.]*

Stubbs II, __ N.C. at __, 770 S.E.2d at 75-76 (emphasis added).

N.C. Gen. Stat. § 15A-1422 provides the authorization for review of the grant or denial of an MAR. Review of a ruling on an MAR is limited by N.C. Gen. Stat. § 15A-1422 to two instances: (1) where the relief was sought pursuant to N.C. Gen. Stat. § 15A-1414 and (2) where the relief was sought pursuant to N.C. Gen. Stat. § 15A-1415. N.C. Gen. Stat. § 15A-1422(b) and (c) (2013). There is no provision in N.C. Gen. Stat. § 15A-1422 for review of an MAR granted pursuant to N.C. Gen. Stat. § 15A-1420(d) – the statute allowing the trial court to move for appropriate relief on its own motion. Similarly, there is no provision for a defendant to seek review of an MAR granted upon the request of the State pursuant to N.C. Gen. Stat. § 15A-1416:

First, we note that defendant does not have a right to appeal from the order of the superior court to this Court. Article 91 of the North Carolina General Statutes, entitled “Appeal to Appellate Division,” indicates when a defendant in a criminal action may appeal to the appellate division.

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It provides that “[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.” N.C. Gen. Stat. § 15A-1444(f) (1997). While N.C. Gen. Stat. § 15A-1422 (1997) indicates that a defendant, in certain instances, may appeal the denial of his own motion for appropriate relief, *it gives no indication that a defendant may appeal the granting of the State’s motion for appropriate relief as is the case here.*

State v. Linemann, 135 N.C. App. 734, 735, 522 S.E.2d 781, 782 (1999) (emphasis added). I see no reason why a defendant can be denied the right to appeal an MAR granted to the State pursuant to N.C. Gen. Stat. § 15A-1416, but the State could not be denied the right to appeal an MAR granted to the defendant pursuant to § 15A-1420(d). In addition, N.C. Gen. Stat. § 15A-1444 – “When defendant may appeal; certiorari,” specifically provides that for a defendant, “[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.” N.C. Gen. Stat. § 15A-1444(f) (2013). The corresponding statute related to the State’s right to appeal, N.C. Gen. Stat. § 15A-1445 – “Appeal by the State,” contains no provision related to appeal or petition for writ of *certiorari* following the grant of an MAR in Defendant’s favor, and contains no provision at all providing the State authority to seek review by writ of *certiorari*. N.C. Gen. Stat. § 15A-1445 (2013). I do not believe the State had any statutory authority to petition this court for review of the trial court’s *sua sponte* grant of the MAR.

B.

The State argued in its petition that this Court has subject matter jurisdiction based upon the North Carolina Constitution and N.C. Gen. Stat. § 7A-32(c), which provides that this Court may issue writs of *certiorari* “as provided by statute or rule of the Supreme Court,” or “according to the practice and procedure of the common law.” The State’s argument is apparently that N.C. Gen. Stat. § 7A-32(c) provides this Court with jurisdiction to issue a writ of *certiorari* in any instance in which to do so would be “in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts[.]” N.C. Gen. Stat. § 7A-32(c) (2013). The State ignores the portion of N.C. Gen. Stat. § 7A-32(c) limiting issue of writs of *certiorari* by this Court to what is “provided by statute or rule of the Supreme Court[.]” N.C. Gen. Stat. § 7A-32(c). Because the General Assembly has provided for instances in

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which this Court may issue a writ of *certiorari* to review the grant of an MAR in N.C. Gen. Stat. § 15A-1422, we are bound by and limited to the authority granted therein. The State did not reference N.C. Gen. Stat. § 15A-1422 in its petition, nor did it ask this Court to issue a writ of *certiorari* pursuant to Rule 21 of the Rules of Appellate Procedure based upon failure to timely appeal, as required by N.C. Gen. Stat. § 15A-1422.¹

In reviewing N.C. Gen. Stat. § 15A-1422, we must follow the established rules of statutory interpretation.

“In resolving issues of statutory construction, we look first to the language of the statute itself.” It is a well-established rule of statutory construction that “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.’”

Walker v. Bd. of Trustees of the N.C. Local Gov’t. Emp. Ret. Sys., 348 N.C. 63, 65-66, 499 S.E.2d 429, 430-31 (1998) (citations omitted). Furthermore, “‘Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.’” *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 307, *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014) (citation omitted).

I believe the language of the statute is clear and requires no interpretation. Furthermore, because N.C. Gen. Stat. § 15A-1422 includes provisions for review of MARs granted pursuant to N.C. Gen. Stat. §§ 15A-1414 and 1415, but not pursuant to N.C. Gen. Stat. § 15A-1420(d), if statutory construction is required, I believe we are constrained to find that N.C. Gen. Stat. § 15A-1422 provides no basis for review pursuant to N.C. Gen. Stat. § 15A-1420(d). *See Linemann*, 135 N.C. App. at 735, 522 S.E.2d at 782 (because N.C. Gen. Stat. § 15A-1422 includes no right of review from the grant of an MAR pursuant to N.C. Gen. Stat. § 15A-1416, no such right exists). Although the omission of an avenue for review of

1. We note that prior opinions of this Court have held that when, as in the present case, the State has no right to appeal the underlying judgment (because there was no alleged error in the underlying judgment), the State cannot appeal a subsequent grant of an MAR in the defendant’s favor. *See State v. Starkey*, 177 N.C. App. 264, 266-67, 628 S.E.2d 424, 425-26 (2006); *State v. Griffin*, 215 N.C. App. 391, 716 S.E.2d 87 (2011) (unpublished opinion). It is my belief that *Stubbs II* implicitly overrules those portions of the opinions of this Court limiting review in this manner.

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an MAR granted pursuant to N.C. Gen. Stat. § 15A-1420(d) – and pursuant to § 15A-1416 – perhaps constitutes an oversight, it is the province of the General Assembly, and not this Court, to rectify any deficiency in the statute, assuming one exists.

III. The Effect of Stubbs II

In *Stubbs II*, our Supreme Court stated the following:

The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: “The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.” N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals “has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice.” N.C.G.S. § 7A-32(c) (2014). More specifically, and also relevant here, *the General Assembly has specified when appeals relating to MARs may be taken*:

(c) The court’s ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:

- (1) If the time for appeal from the conviction has not expired, by appeal.
- (2) If an appeal is pending when the ruling is entered, in that appeal.
- (3) *If the time for appeal has expired and no appeal is pending, by writ of certiorari.*

Id. § 15A-1422(c) (2014). Here, *given the timing*, appeal of the MAR *would fall under subdivision (c)(3): by writ of certiorari*. Notably, subsection 15A-1422(c) does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails. Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers “to supervise and control the proceedings of any of the trial courts of the General Court of Justice,” *id.* § 7A-32(c), and given that the

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General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that *the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.*

Stubbs II, __ N.C.at __, 770 S.E.2d at 75-76 (emphasis added). I believe that N.C. Gen. Stat. § 15A-1422, as interpreted by our Supreme Court, provides the State with the statutory authority required for direct appeal of an MAR *when requested by a defendant pursuant to N.C. Gen. Stat. §§ 15A-1414 or 15A-1415*. In my opinion, the language in *Stubbs II* clearly implies that, when a defendant moves for appropriate relief, any of the enumerated avenues of appeal are available to the State, depending on when the MAR is ruled upon. *Certiorari* was the only avenue available in *Stubbs* because “*given the timing*, appeal of the MAR would fall under subdivision (c)(3): by writ of certiorari.” *Id.* at __, 770 S.E.2d at 76 (emphasis added). In the present case, because the trial court granted the MAR immediately following sentencing, the State, assuming *arguendo* Defendant had moved for the MAR, would have been required to directly appeal the order granting the MAR. Pursuant to N.C. Gen. Stat. §§ 15A-1422(b) and (c)(1), there was no authority granting jurisdiction to this Court to proceed pursuant to writ of *certiorari*. As stated above, I do not believe there is any right of review in the General Statutes for an MAR granted pursuant to N.C. Gen. Stat. § 1420(d). However, even assuming *arguendo* there is such a right of review, the State would have been required by N.C. Gen. Stat. § 15A-1422 (b) or (c) to directly appeal the MAR, which it failed to do. *Certiorari*, pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) is only available if the trial court grants or denies an MAR *after the time for appeal of the underlying judgment has expired and no appeal is pending*. *Id.* There was no avenue that was available to the State to challenge the trial court’s *sua sponte* granting of the MAR in favor of Defendant over three months after the MAR was granted. N.C. Gen. Stat. § 15A-1422; N.C.R. App. P. 4 (2015).

Assuming, *arguendo*, this Court could appropriately review the State’s petition as if the trial court proceeded pursuant to N.C. Gen. Stat. § 15A-1415, because the trial court ruled on the MAR before “the time for appeal from the conviction [had] expired,” the State was still required to challenge the trial court’s ruling “by appeal.” N.C. Gen. Stat. § 15A-1422(c)(1). Even assuming *arguendo* that N.C. Gen. Stat. § 15A-1422(c)(3) could provide an avenue for review by *certiorari* in this instance, I do not believe N.C. Gen. Stat. § 15A-1422(c)(3) allows a petitioner – in this case the State – to sit on its right to seek review indefinitely. N.C. Gen. Stat.

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§ 15A-1422(c)(3) states: “The court’s *ruling* on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review.” “If the *time for appeal has expired* and no appeal is pending, by writ of certiorari.” N.C. Gen. Stat. § 15A-1422(c)(3) (emphasis added). Rule 21 of the North Carolina Rules of Appellate Procedure, entitled “Certiorari,” states in relevant part:

(c) *Same; Filing and service; Content.* The petition [for writ of *certiorari*] shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties.

....

(e) *Petition for Writ in Postconviction Matters; to Which Appellate Court Addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. *In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court.*

N.C.R. App. P. 21 (2015) (some emphasis added). Review by *certiorari* is not available in the present case because “the time for appeal [had *not*] expired” when the ruling on the MAR was made, *and* the State failed to timely appeal or petition for writ of *certiorari* within a reasonable time following the ruling granting the MAR. N.C. Gen. Stat. § 15A-1422(c)(3) (emphasis added); N.C.R. App. P. 21; *see also State v. Foreman*, 364 N.C. 328, 701 S.E.2d 669 (2010) (unreasonable delay in petitioning for writ of certiorari will result in denial of the petition); *In re L.R.*, 207 N.C. App. 264, 699 S.E.2d 479 (2010) (unpublished opinion) (“The ‘Rules of Appellate Procedure do not set forth a specific time period in which a [petitioner] must file a petition for *writ of certiorari*,’ but the court must in its discretion determine what constitutes an unreasonable delay in relation to the circumstances in each case. In our discretion, we decline to review the adjudication order of 7 July 2009 because [the petitioner] has not shown any reason for her delay in appealing that order and

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her failure to timely assert her right of appeal. [The petitioner] waited ten months after the 7 July 2009 adjudication order before filing a petition for writ of *certiorari*. [The petitioner] gives no reason for this long delay. Therefore, the 7 July 2009 order remains valid and final, and we do not address [the petitioner's] arguments regarding that order."] (citation omitted).

I would therefore hold: (1) This Court is not bound by the order of the prior panel of this Court granting *certiorari* because the prior panel lacked subject matter jurisdiction and, therefore, its order is a nullity; (2) this Court has not been granted jurisdiction by the General Assembly to review the grant or denial of an MAR pursuant to N.C. Gen. Stat. § 15A-1420(d); and (3) even assuming, *arguendo*, this Court could have jurisdiction pursuant to N.C. Gen. Stat. §§ 15A-1422 (b) or (c), the State has failed to act in a timely manner in either appealing or petitioning for review and has not shown any reason for the delay. The State's petition for writ of *certiorari* and appeal should be dismissed.

STATE OF NORTH CAROLINA

v.

CHARLES DIONE WARREN, DEFENDANT

No. COA14-1359

Filed 4 August 2015

Search and Seizure—traffic stop—extended for drug dog—reasonable suspicion

The trial court did not err in partially denying defendant's motion to suppress evidence seized during a traffic stop in a prosecution for possession of cocaine and drug paraphernalia where a drug dog was called in. Defendant was observed and stopped in a high crime area, the officer saw that defendant had something in his mouth which he was not chewing and which affected his speech, the officer observed individuals attempt to hide drugs in their mouths, and defendant denied being involved in drug activity "any longer." Based on the totality of the facts, the trial court's unchallenged findings established a minimal level of objective justification for reasonable suspicion of criminal activity and the extension of the traffic stop.

Judge ELMORE dissenting.

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Appeal by Defendant from judgment entered 3 July 2014 and order entered 3 September 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 7 May 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General James A. Wellons, for the State.

Bryan Gates for Defendant-appellant.

DILLON, Judge.

Charles Dione Warren (“Defendant”) appeals from the trial court’s order denying in part his motion to suppress and from a conviction for felony possession of cocaine and attaining the status of habitual felon. For the following reasons, we affirm the trial court’s order.

I. Background

Defendant was indicted for various drug offenses in connection with the discovery of illegal drugs and drug paraphernalia in his car during a traffic stop and for attaining the status of habitual felon. Defendant filed motions to suppress certain evidence collected during warrantless searches by the police.

Prior to trial on the matter, the trial court conducted an evidentiary hearing on Defendant’s motions. After the hearing, the trial court entered an order granting Defendant’s motion to suppress information retrieved from cell phones seized from Defendant’s car but denied his motion as to anything else seized by police.

The case was tried before a jury, and Defendant was found guilty of felonious possession of cocaine and possession of drug paraphernalia. Defendant pleaded guilty to attaining the status of habitual felon. The trial court arrested judgment on the possession of drug paraphernalia conviction and sentenced Defendant as an habitual felon to 38 to 58 months of imprisonment for the felony possession of cocaine conviction. Defendant gave notice of appeal in open court.

II. Analysis

On appeal, Defendant challenges the trial court’s partial denial of his motion to suppress certain evidence found during a routine traffic stop. Defendant does not contest the validity of the stop itself. Rather, Defendant contends that the court erred in concluding that the officer had reasonable suspicion *to extend* the scope and length of time of a routine traffic stop to allow a police dog to perform a drug sniff outside

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his vehicle, which led to the discovery of contraband in Defendant's vehicle. Specifically, Defendant challenges the trial court's conclusion "[t]hat [the officer] had reasonable articulable suspicion to extend the scope of the initial stop and subject the Defendant's vehicle to the canine search and that the Defendant was not unreasonably detained nor the scope of the initial stop unreasonably extended for the purpose of that canine sniff search."

This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878 (marks omitted).

We believe that based on the trial court's unchallenged findings, the officer had reasonable suspicion to extend the routine traffic stop to perform a dog sniff; and, accordingly, we hold that the trial court did not err in partially denying Defendant's motion to suppress.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008). "[A]n officer may stop a vehicle on the basis of a reasonable, articulable suspicion that criminal activity is afoot." *State v. Styles*, 362 N.C. 412, 427, 665 S.E.2d 438, 447 (2008).

As the United States Supreme Court recently explained, during the course of a stop for a traffic violation, an officer may – in addition to writing out a traffic citation - perform checks which "serve the same objective as enforcement of the traffic code[.]" *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L.Ed. 2d 492, 499 (2015). These checks typically include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* The Court further held that under the Fourth Amendment an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop, [but] . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion

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ordinarily demanded” to justify detaining an individual. *Id.* The Court specifically held that the performance of a dog sniff is *not* a type of check which is related to an officer’s traffic mission. *Id.* Therefore, under *Rodriguez*, an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop.

We note that prior to *Rodriguez*, many jurisdictions – including North Carolina – applied a *de minimis* rule, which allowed police officers to prolong a traffic stop “for a very short period of time” to investigate for other criminal activity unrelated to the traffic stop – for example, to execute a dog sniff – though the officer has no reasonable suspicion of other criminal activity. *State v. Sellars*, 222 N.C. App. 245, 249-50, 730 S.E.2d 208, 211 (2012). *See also State v. Brimmer*, 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007). However, the holdings in these cases to the extent that they apply the *de minimis* rule have been overruled by *Rodriguez*.

In the present case, it is unclear from the trial court’s findings whether the execution of the dog sniff prolonged the traffic stop. Specifically, the trial court found that the officer stopped Defendant for a traffic offense; that the officer called for backup during the stop; that the backup arrived; that the officer performed the dog sniff while his backup completed writing out Defendant’s traffic citation; and that the entire stop lasted less than ten minutes. What is unclear is whether the officer’s call for backup or waiting for backup to arrive prolonged the stop beyond that which was necessary to complete the traffic stop.

Notwithstanding, unlike in *Rodriguez*, the trial court’s findings support the conclusion that the officer had developed *reasonable suspicion* of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. We note that the State does not need to show that the officer had “probable cause” of illegal drug activity but that he merely had “reasonable suspicion” to extend the stop. *See Rodriguez v. United States*, ___ U.S. at ___, 191 L.Ed. 2d at 499. And as our Supreme Court has pointed out “[r]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required.” *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (marks omitted). In determining whether an officer had a reasonable suspicion of criminal activity, the court must examine both the facts known to the

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officer at the time he decided to approach the defendant and the rational inferences that may be drawn from those facts. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979). Also, “the reviewing court must take into account an officer’s training and experience.” *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997). In making this determination, “the court must view the totality of the circumstances through the eyes of a reasonable and cautious police officer at the scene.” *State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993).

In the context of a traffic stop, a Defendant’s proximity to a high crime area alone does not constitute reasonable suspicion; however, a defendant’s presence in such area coupled with some sort of evasive behavior may constitute reasonable suspicion. *See, e.g., State v. Jackson*, ___ N.C. ___, ___ S.E.2d ___ 2015 N.C. LEXIS 446 (N.C., June 11, 2015) (holding that officer had reasonable suspicion where the defendant was in a high crime area and took evasive action in the presence of the officer); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (stating that “when an individual’s presence at a suspected drug area is *coupled* with evasive action, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop”).

In the context of the present case, we note that this Court has held that an officer had reasonable suspicion to detain an individual based on facts similar to those here. Specifically, in *In re I.R.T.*, officers approached a group of individuals, including a juvenile, in an area known for drug activity. 184 N.C. App. 579, 581, 647 S.E.2d 129, 132 (2007). When one officer approached the juvenile, he looked at the officer and quickly turned his head; it appeared to the officer that the juvenile had something in his mouth. *Id.* The officer explained “that he had previously encountered individuals acting evasive and hiding crack-cocaine in their mouths, and those experiences made him suspect [the juvenile] might be hiding drugs in his mouth.” *Id.* The officer detained the juvenile which eventually led to the discovery of a crack-cocaine rock that was in the juvenile’s mouth. *Id.* On appeal from his adjudication and the denial of his motion to suppress, this Court held that “the juvenile’s conduct, his presence in a high crime area, and the police officer’s knowledge, experience, and training [was] sufficient to establish” that the officer had a reasonable suspicion to justify an investigatory seizure of the juvenile. *Id.* at 581-82, 585, 647 S.E.2d at 132-33, 135.

Likewise, here, in support of its conclusion that reasonable suspicion to extend the scope of the stop, the trial court found that Defendant was observed and stopped “in an area [the officer] knew to be a high crime/high drug activity area[;]” that while writing the warning citation,

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the officer observed that Defendant “appeared to have something in his mouth which he was not chewing and which affected his speech[;]” that “during his six years of experience [the officer] who has specific training in narcotics detection, has made numerous ‘drug stops’ and has observed individuals attempt to hide drugs in their mouths and . . . swallow drugs to destroy evidence[;]” and that during their conversation Defendant denied being involved in drug activity “any longer.” We hold that based on the totality of the facts the trial court’s unchallenged findings establish the “minimal level of objective justification” to show that the officer had reasonable suspicion to believe that criminal activity was occurring to justify the extension of the traffic stop.¹

Accordingly, we hold that the trial court did not err in concluding the same and in denying Defendant’s motion to suppress.

AFFIRMED.

Judge GEER concurs.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority’s conclusions that the trial court did not err in denying defendant’s motion to suppress. As a result, I would reverse the trial court’s order denying defendant’s motion to suppress, vacate the judgment, and remand to the trial court.

The majority concludes that the facts in defendant’s case support the trial court’s finding that the officer had a reasonable articulable suspicion to extend the scope of the initial stop to allow a canine search of defendant’s vehicle. I disagree. The majority recognizes that when an individual’s presence in a suspected high crime area is coupled with evasive action, law enforcement may form reasonable suspicion from the evasive actions. *Willis, supra*. As such, the majority concludes that

1. The dissenting Judge argues that the officer’s reasonable suspicion to justify prolonging the traffic stop cannot be based in this case on the officer’s observance of an object in Defendant’s mouth. Specifically, the dissenting Judge points out that the present case differs from *I.R.T.* in that in the present case the officer never asked Defendant about the object in his mouth nor asked Defendant for consent to search his mouth. We recognize that the lack of any evidence that the officer specifically inquired about the object makes the question of whether the officer had reasonable suspicion closer. However, notwithstanding a lack of evidence that the officer inquired about the object in Defendant’s mouth, we believe that Defendant’s act of speaking with the officer for a period of time without removing or chewing on an object which was affecting his speech – when coupled with the other factors cited above – is sufficient to establish reasonable suspicion.

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the facts in *In re I.R.T.*, are analogous to those facts in the case at hand. *In re I.R.T.*, 184 N.C. App. 579, 581-83, 647 S.E.2d 129, 132-33 (2007). I disagree.

In *I.R.T.*, the officer testified that when he approached the juvenile in a high crime area, he witnessed the juvenile “quickly turned his head away” from him. *Id.* at 585, 647 S.E.2d at 135. Further, the officer testified that the juvenile “kept his head turned away from [him] and . . . [the officer] could tell that he was not moving his mouth [while responding to the officer’s questions] as though he had something inside of his mouth.” *Id.* at 585-86, 647 S.E.2d at 135. The officer alleged that “individuals that have exhibited those characteristics have generally kept crack-cocaine in their mouths.” *Id.* at 586, 647 S.E.2d at 135. Importantly, suspecting the juvenile of hiding drugs in his mouth, the officer requested that the juvenile spit out what was in his mouth. *Id.* at 581, 647 S.E.2d 132. The juvenile spit out crack cocaine wrapped in cellophane. *Id.* This Court discerned that the juvenile’s “turning away from the officer and not opening his mouth while speaking constituted evasive actions”, and we accordingly held that the juvenile’s evasive conduct, presence in a high crime area, and the officer’s training was sufficient to establish reasonable suspicion. *Id.* at 586, 647 S.E.2d at 135.

The *I.R.T.* Court relied, in part, on *State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995). In *Watson*, this Court found reasonable suspicion to justify an investigatory seizure when police approached a convenience store located in a high crime area and witnessed the defendant make “evasive maneuvers to avoid detection, i.e., putting the drugs in his mouth, attempting to swallow the drugs by drinking Coca-Cola and attempting to go into the store.” *Id.* at 398, 458 S.E.2d at 522. The defendant “was ordered to spit out the objects in his mouth[.]” *Id.* at 396-97, 458 S.E.2d at 521. When the defendant refused, the officer applied pressure to the defendant’s throat and he spit out three baggies of crack cocaine. *Id.* at 397, 458 S.E.2d at 519.

I agree with this Court’s holdings in both *I.R.T.* and *Watson*. Not only were the defendants present in high crime areas, each acted evasively when confronted by law enforcement. However, the facts in *I.R.T.* and *Watson* are markedly different from the facts in the case before us.

Here, there is no question that the officer stopped defendant in a high crime area for a traffic violation. Upon finding defendant’s license and registration to be valid and that the car was registered to defendant, the officer issued defendant a warning ticket. The officer began writing the warning ticket while standing at defendant’s driver side door.

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The officer talked to defendant when he wrote the ticket. In speaking with defendant, the officer alleged that he thought defendant had something in his mouth. The following colloquy occurred at trial:

DEFENSE COUNSEL: You said [defendant] had something in his mouth and he wasn't chewing on it?

OFFICER: Correct.

DEFENSE COUNSEL: Was it peppermint?

OFFICER: I don't know.

DEFENSE COUNSEL: Well, was there some other type of hard candy?

OFFICER: I don't know.

DEFENSE COUSEL: Did you see any type of plastic or anything coming out the corner of [defendant's] mouth that would indicate that it was some type of packaging[?]

OFFICER: No. . . . Just something in his mouth. I couldn't tell.

DEFENSE COUNSEL: Okay. And that caused you concern?

OFFICER: I notated.

Defense counsel asked the officer, "[w]hile you're writing the warning ticket, you are engaged in conversation with [defendant]?" The officer replied, "[y]es, sir." Defense Counsel asked, "[h]e engages in conversation back with you?" The officer replied, "[h]e does." The record shows that during their conversation, the officer informed defendant that he was stopped in a high crime area and pointed out to defendant that the Berkshire Apartments were known for their drug activity. The officer asked defendant if he was on probation, and defendant answered that he was not. The officer asked if defendant had any prior drug offenses, and defendant said "he wasn't involved in that type of stuff anymore." Defendant informed the officer that he was self-employed in landscaping. Defense counsel asked the officer whether the object remained in defendant's mouth during the conversation, and the officer answered in the affirmative. Defense counsel questioned, "[y]ou don't ask him about [the object]?" The officer replied, "[t]hat's correct."

The officer admitted that the traffic stop turned into a drug investigation solely because defendant was in a known drug area and because defendant had an unidentified object in his mouth. Defense counsel

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questioned, “the only thing that concerned you was some object that was in [defendant’s] mouth that you were unable to identify?” The officer replied, “[a]lso, the area that he was coming from of course.” While the officer was writing the warning citation, he asked defendant if there was anything illegal in his vehicle. The officer asked defendant if he could check his vehicle for narcotics, and defendant said no. The officer then asked defendant to step out of his vehicle so he could search defendant’s person for “guns, drugs, or other weapons.” The officer testified that defendant consented to the search—he “didn’t . . . resist the search at all.” Further, the search yielded nothing illegal or suspicious.

Notably, defense counsel asked, “[y]ou have consent to search his entire person, do you believe that?” The officer replied, “[y]es, I do.” Defense counsel questioned, “[b]ut you do not search his mouth?” The officer admitted, “[t]hat’s correct.” After finding no evidence of contraband on defendant’s person, and not searching defendant’s mouth, the officer continued to detain defendant as he called for backup. When a second officer arrived, he was instructed to finish writing the warning citation while the first officer conducted the canine sniff of defendant’s vehicle. It was not until after the canine sniff test was completed that the officer searched defendant’s mouth. The officer alleged that defendant appeared to swallow something.

These facts, taken in totality and viewed through the eyes of a reasonable, cautious officer, do not support the trial court’s finding that the officer had reasonable suspicion to justify extending the traffic stop. Unlike in *I.R.T.* and *Watson*, where the defendants took evasive actions to avoid law enforcement, the record here shows that defendant did not act evasively. Specifically, defendant engaged in a conversation with the officer during which he was able to speak clearly enough to inform the officer that he was not on probation and worked in landscaping. Additionally, defendant “didn’t . . . resist the search [of his person] at all.” Further, defendant allowed the officer to check his license and registration, which were in good standing. In doing so, the officer returned to his patrol vehicle, and defendant would have had an opportunity to spit out what was allegedly in his mouth. Finally, the officer testified that defendant was “polite” and there were no “issues” with the traffic stop.

Of utmost importance in this case, the officer *did not* search defendant’s mouth during the search of his person. Moreover, the officer admittedly never questioned defendant about the alleged unknown item in his mouth until after the canine sniff. Nonetheless, the majority points to the officer’s six years of experience in narcotics detection as well as his belief that defendant was concealing something in his mouth to

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support a finding of reasonable suspicion. Arguably, an experienced officer would take steps to determine what, if anything, was in a person's mouth at the outset of a stop when such a suspicion was the basis for the search of that person.

Because the officer neither questioned defendant about having an item in his mouth nor did he search defendant's mouth, I find it highly objectionable that the purported evasive conduct that essentially tipped the scale in favor of finding reasonable suspicion was the officer's mere alleged suspicion that defendant had an unknown object in his mouth. Had the officer taken any steps to confirm his suspicion, a canine search of defendant's vehicle would debatably have been permissible based upon reasonable suspicion. Egregiously, the officer neglected to investigate his suspicion, yet still felt justified in prolonging the stop to conduct a canine sniff of the outside of defendant's vehicle. Notably, the officers in *I.R.T.* and *Watson* both demanded that the defendants spit out what was hidden in their mouths as part of the investigatory stop.

To me, these facts suggest that the officer was acting on no more than an "unparticularized suspicion or hunch" that defendant's vehicle contained contraband based on defendant's presence in a high crime area. *State v. Brown*, 217 N.C. App. 566, 572, 720 S.E.2d 446, 450 (2011) *writ denied, review denied*, 365 N.C. 541, 742 S.E.2d 187 (2012) (citation and quotation omitted). It is well established that a suspicion or hunch is insufficient to form the basis of reasonable suspicion. *Id.* Because the facts of this case do not support a finding that the officer had reasonable suspicion to believe that criminal activity was afoot to justify the extension of the traffic stop, I respectfully disagree with the majority's opinion.

Because the officer lacked reasonable suspicion, under *Rodriguez*, the question for this Court becomes whether the officer unlawfully prolonged an otherwise completed traffic stop in order to conduct a canine sniff outside of defendant's vehicle. Again, an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, so long as he does so in a way that does not prolong the stop. *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L.Ed. 2d 492, 499 (2015). The unrelated checks include: checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *Id.* "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* However, "[l]acking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." *Id.*

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In *Rodriguez*, the Supreme Court framed the “critical” question as “not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop” *Id.* at ___, 191 L.Ed. 2d at 496. As the Supreme Court opined, “[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete [the stop’s] mission.” *Id.* at ___, 191 L.Ed. 2d at 499 (citation and quotation omitted) (alteration in original). A traffic stop prolonged beyond that point is unlawful. *Id.*

The majority contends that “it is unclear from the trial court’s findings whether the execution of the dog sniff prolonged the traffic stop.” I disagree. In the instant case, the officer’s actions inevitably prolonged the traffic stop beyond the amount of time reasonably required to complete the stop’s mission. After checking defendant’s license and registration and confirming that the vehicle was registered to defendant, the officer stood by defendant’s door and began issuing him a warning ticket. The officer could have reasonably completed writing the citation in a matter of one to two minutes. However, the officer struck up a conversation with defendant, which led to the officer having defendant exit the vehicle, searching defendant’s pockets, calling a backup officer, explaining the situation to the new officer, requesting that the new officer complete the warning ticket, and finally getting the canine from the patrol vehicle and conducting the sniff test. While this string of events may have only extended the stop for minutes, the stop was nonetheless extended beyond the amount of time required to reasonably complete the stop’s mission. I am of the impression that the time it took for the officer to complete the traffic-based inquiries of checking defendant’s license and registration constituted the reasonable amount of time for the stop—any holdover thereafter was unreasonable because the officer lacked reasonable suspicion. I recognize that past precedent has held that any delay in this case was *de minimis*. However, in light of the Supreme Court’s holding in *Rodriguez*, we are no longer bound to follow the *de minimis* rule.

Because the officer had (1) finished completing the traffic-based inquiries of checking defendant’s license and registration, (2) was in the middle of issuing the warning ticket, and (3) the additional time defendant was detained was used to conduct a check that was unrelated to the officer’s otherwise lawful traffic stop, I am of the opinion that the officer unreasonably extend the duration of the stop in order to conduct a canine sniff of the outside of defendant’s vehicle. Further, by prolonging the traffic stop, defendant’s Fourth Amendment rights were violated. Therefore, I conclude that the trial court erred in denying defendant’s motion to suppress evidence.

STIKELEATHER REALTY & INVS. CO. v. BROADWAY

[242 N.C. App. 507 (2015)]

STIKELEATHER REALTY & INVESTMENTS CO., PLAINTIFF-APPELLANT

v.

ELISHA BROADWAY, DEFENDANT-APPELLEE

No. COA14-1136-2

Filed 4 August 2015

Landlord and Tenant—eviction action—rent abatement—smoke alarm not operable

The findings fact did not support the trial court’s conclusion that defendant-tenant was entitled to rent abatement under the Residential Rental Agreements Act (RRAA) on a counterclaim to an eviction action. While N.C.G.S. § 42-42(a)(5) and (7) impose upon landlords the duty to provide operable smoke and carbon monoxide alarms, the duty is triggered only if a landlord is notified of the needed repair or replacement, or if it is the beginning of a tenancy. As to the award of rent abatement, the trial court did not articulate its rationale with any specificity.

Appeal by plaintiff from judgment entered 18 July 2014 by Judge Matt Osman in Mecklenburg County District Court. Heard in the Court of Appeals 18 March 2015.

The Law Firm of Ross S. Sohm, PLLC, by Ross S. Sohm, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

HUNTER, JR., Robert N., Judge.

Stikeleather Realty & Investments Co. (“Plaintiff-Landlord”) appeals from a bench trial judgment awarding trebled rent abatement and attorney’s fees to Elisha Broadway (“Defendant-Tenant”) on claims of breach of the implied warranty of habitability and unfair and deceptive trade practices. We reverse.

I. Factual & Procedural History

On 19 March 2014, Plaintiff-Landlord initiated a summary ejectment action against Defendant-Tenant for breach of a residential lease agreement for failure to pay rent for the month of March. On 31 March 2014, Defendant-Tenant filed an answer and asserted the defense of retaliatory eviction pursuant to N.C. Gen. Stat. § 42-37.1, as well as counterclaims

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for (1) breach of the implied warranty of habitability pursuant to N.C. Gen. Stat. § 42-42, (2) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.*, (3) unfair debt collection practices pursuant to N.C. Gen. Stat. § 75-50 *et seq.*, (4) negligence, and (5) negligence per se.

On 22 April 2014, Plaintiff-Landlord filed an amended complaint, alleging Defendant-Tenant also breached the lease by keeping an unauthorized pet. On 2 May 2014, Defendant-Tenant filed an amended answer and counterclaim, which contained no substantive changes pertinent to this appeal. On 8 May 2014, the magistrate entered judgment in favor of Plaintiff-Landlord on the primary claim of possession and in favor of Defendant-Tenant on his counterclaim of breach of the implied warranty of habitability only, awarding him \$1,000.00 in damages. Plaintiff appealed to the district court.

On 30 June 2014, the case was heard in Mecklenburg County District Court before the Honorable Matt Osman. At that time, Defendant-Tenant had already surrendered possession of the property. Therefore, the sole issue before the trial judge was Defendant-Tenant's counterclaim for breach of the implied warranty of habitability. The transcript of this bench trial, as well as the record on appeal, reveals the following pertinent facts.

In May 2010, Defendant-Tenant entered into a residential lease to rent a home located at 2600 Catalina Avenue in Charlotte ("the property") for \$500 per month. At this time, the property was neither owned nor managed by Plaintiff-Landlord. The lease contained a page signed by Defendant-Tenant stating that a "Carbon/Smoke Detector"¹ existed in the home and that it was in good working condition when Defendant-Tenant took possession of the property. The lease also provided that Defendant-Tenant shall make requests for repairs in writing. On 4 June 2013, Mr. Kluth, a real estate broker, visited the property to obtain general information to list the house. On 10 June 2013, Mr. Kluth returned to the property for another inspection, this time bringing an interested buyer, Mr. Stikeleather, managing partner of Plaintiff-Landlord, a limited liability corporation in the business of buying and selling residential properties.

During this second pre-sale inspection, Mr. Stikeleather asked Defendant-Tenant if the property had a smoke alarm and carbon

1. While the word "detector" appears throughout the record on appeal, this Court uses "alarm" synonymously, in order to reflect amendments by the N.C. General Assembly to this same effect. See 2012 N.C. Sess. Laws 350, 350-52, ch. 92, § 1-4 (replacing the word "detector" with "alarm" throughout provisions of the Residential Rental Agreements Act).

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monoxide alarm. Defendant-Tenant responded that it did not. Mr. Kluth then went to his truck and returned with a smoke alarm and carbon monoxide alarm for Defendant-Tenant to put in the property.

On or around 26 June 2013, Plaintiff-Landlord purchased the property and sent a letter to Defendant-Tenant notifying him that Plaintiff-Landlord was the new owner and property manager. The letter also directed Defendant-Tenant to call Plaintiff-Landlord to set up an inspection of the property and to put any requests for repairs in writing.

On or around 24 September 2013, Mr. Stikeleather went by the house to do an inspection, but it had to be “quick” because of the presence of an unauthorized pet on the premises. During this inspection, Mr. Stikeleather testified that he observed an alarm in the living room, plugged into an electrical outlet in the wall, but he admitted he did not verify whether it was working properly.

Near the middle of March 2014, Defendant-Tenant called Mr. Stikeleather and told him he would be late with March’s rent; Mr. Stikeleather responded that he would file eviction papers, which he did on 19 March 2014. Two days after the parties appeared in small claims court near the end of March 2014, Plaintiff-Landlord sent his repairman to install a smoke alarm and carbon monoxide alarm in the premises. Defendant-Tenant felt it was unfair to be evicted for being only a few days late on rent, so he went to City Code Enforcement, which issued an inspection report that does not mention any issue with the property’s smoke alarm and carbon monoxide alarm. Defendant-Tenant did not pay rent for the months of March, April, or May 2014.

The day after the bench trial, on 1 July 2014, the trial judge entered a judgment containing the following pertinent findings of fact, whose order has been reorganized by this Court in an effort to improve clarity:

3. [Defendant-Tenant] lived at 2600 Catalina, Charlotte, NC (“the property”), for four years and three months.

....

43. [Defendant-Tenant’s] son, Ronald Broadway (RB), lived with his father at the property.

....

4. At the time [Defendant-Tenant] took possession of the property in 2010 it was owned and managed by a different landlord than the Plaintiff in this action.

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....

65. [Mr.] Stikeleather is the managing partner of the LLC that is [Plaintiff-Landlord].

....

76. [Plaintiff-Landlord's] LLC owns approximately 200 properties and manages another 300 properties.

....

55. Mike Kluth is a real estate broker in Charlotte and he sold the property to [Plaintiff-Landlord].

56. Prior to selling the house, Mr. Kluth visited the property in June 2013 to obtain general information to list the house.

....

58. During a second pre-sale inspection of the property in June 2013, [Defendant-Tenant] told Mr. Kluth and [Mr. Stikeleather] about the flooding in the basement. The basement was dry when Mr. Kluth and [Mr. Stikeleather] saw it.

59. During the second inspection [Mr. Stikeleather] asked [Defendant-Tenant] about a Smoke/Carbon detector. [Defendant-Tenant] said there was not one present in the property.

60. Mr. Kluth then went to his car and got a Smoke/Carbon detector to place in the house.

61. Mr. Kluth does not know whether the detector, which was not new, was operational. The detector could be plugged into the wall and could also be run on batteries.

62. [Defendant-Tenant] testified that the detector provided by Mr. Kluth did not work.

....

38. In June 2013, [Plaintiff-Landlord] notified [Defendant-Tenant] in writing that the property had been sold and that [Plaintiff-Landlord] was the new owner and property manager. Plaintiff[-Landlord] admitted Plaintiff's Exhibit 2, a letter dated June 26, 2013, detailing the change in ownership.

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39. In addition to telling [Defendant-Tenant] about the new management company, Plaintiff[-Landlord's] Exhibit 2 also directed [Defendant-Tenant] to put any requests for repair in writing and asked [Defendant-Tenant] to call [Plaintiff-Landlord] to set up an inspection.

....

66. The only potential repair issue that [Plaintiff-Landlord] was aware of at the time of the purchase was the basement and the flooding.

....

2. The parties have also stipulated to the existence of a lease between [Defendant-Tenant] and Plaintiff[-] Landlord. . . .

....

21. The lease contains a page signed by [Defendant-Tenant] stating that the property had a "Carbon/Smoke Detector" in the unit and that it was in good working condition when [Defendant-Tenant] took possession in 2010.

....

29. Paragraph 17 of the lease states that [Defendant-Tenant] shall make a request for repair in writing.

....

70. After taking ownership of the property, [Mr. Stikeleather] went by the house in the fall of 2013 to do a quick inspection. It was a quick inspection due to the presence of [Defendant-Tenant's] dog.

71. [Mr. Stikeleather] testified that the dog was not permitted at the property[.]

72. [Mr. Stikeleather] did observe a detector that was plugged in during [the] fall 2013 inspection but did not verify whether it was working properly.

....

32. [Defendant-Tenant] called [Mr. Stikeleather] to tell him that he would be late with the March [2014] rent and [Mr. Stikeleather] said that he would file eviction papers.

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....

75. [Plaintiff-Landlord] sent his repairman to install a detector after the first hearing in small claims court in late March 2014.

....

22. [Defendant-Tenant] and [Defendant-Tenant's] son[, RB,] were present when a new detector was installed by [Plaintiff-Landlord's] employee in 2014.

....

47. RB testified that the property did not have a Smoke/Carbon detector upon initial[] occupancy. There [was] a blank spot where it appeared one had previously been with a painted[-]over bracket.

48. RB was present when [Plaintiff-Landlord's] staff came out and installed a Smoke/Carbon detector, a few days after the first court appearance in 2014. RB watched the installation and [Plaintiff-Landlord's] staff did not remove an old detector prior to installing a new one.

....

33. [Defendant-Tenant] did not think it was fair to be evicted for being seventeen days late on the rent so he went to City Code Enforcement.

....

40. The city inspected the property and issued a list of code violations. Plaintiff[-Landlord] admitted the Code Enforcement report as Plaintiff's Exhibit 3.

41. The Code Enforcement report does not list the carbon/smoke detector.

....

68. [Mr. Stikeleather] told [Defendant-Tenant] several times to put repair requests in writing, as required by the lease.

69. [Mr. Stikeleather] testified that he never received any written or verbal repair requests from [Defendant-Tenant].

....

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78. [Mr. Stikeleather] testified that he has made numerous requests for access and for a key to the Property, including by certified mail, so that he could do an inspection and make repairs to the property. [Defendant-Tenant] never responded to those requests.

79. [Defendant-Tenant] did not introduce any portion of the Charlotte City Housing Code.

....

1. [Defendant-Tenant] did not pay rent for March, April or May 2014, and that the monthly rent was \$500.

Based upon these findings, the trial judge concluded the following as a matter of law:

2. [Defendant-Tenant] has failed that [sic] show that [Plaintiff-Landlord] breached the implied warranty of habitability for the issues related to the flooded basement, broken step, inoperable and broken windows and faulty electrical system because [Defendant-Tenant] failed to provide proper written notice of these issues and also failed to provide reasonable access to [Plaintiff-Landlord] to permit an inspection to determine if there were any structural or electrical issues;

3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide detector. [Defendant-Tenant] is therefore entitled to rent abatement;

....

6. [Defendant-Tenant] is entitled to rent abatement of \$150 per month;

7. [Plaintiff-Landlord's] continued collection of rent without verifying that [Defendant-Tenant] had been provided an operable smoke alarm and carbon monoxide detector constituted an Unfair and Deceptive Trade Practice;

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8. Because [Plaintiff-Landlord] has committed an Unfair and Deceptive Trade Practice, [Defendant-Tenant's] damages shall be trebled;

9. [Defendant-Tenant's] damages shall be offset by an abatement credit of \$350 for March 2014 where [Defendant-]Tenant did not pay rent but before the new detector was installed and \$500 per month for April and May 2014 where [Defendant-]Tenant did not pay rent but after the new detector was installed for a total abatement credit of \$1350.

Based upon the foregoing, the trial judge entered the following judgment:

1. Defendant[-]Tenant's claim for rent abatement and Unfair and Deceptive Trade Practices is granted;
2. Defendant[-]Tenant is awarded damages in the amount of \$2250 (\$1200 in rent abatement, trebled to \$3600 pursuant to Chapter 75 minus tenant's abatement credit of \$1350);
3. Defendant[-]Tenant is entitled to reasonable attorney fees, pursuant to Chapter 75. [Defendant-Tenant] shall submit an affidavit for attorney fees and [Plaintiff-Landlord] shall have an opportunity to respond;
4. All other counterclaims filed by [Defendant-Tenant] are denied.

Plaintiff-Landlord appeals.

II. Analysis

Plaintiff-Landlord contends the trial court erred by (1) granting Defendant-Tenant's counterclaim for rent abatement under the Residential Rental Agreements Act ("RRAA"), (2) improperly calculating the damage award under the RRAA, (3) concluding the alleged RRAA violation constituted a breach of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTP"), and (4) awarding Defendant-Tenant reasonable attorney's fees under UDTP. Because we agree the trial court erred in concluding Plaintiff-Landlord violated the RRAA, the damages awarded for rent abatement, which were trebled under UDTP, as well as the attorney's fees awarded under UDTP, must be reversed.

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A. Standard of Review

“The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (internal quotation marks and citation omitted). “In all actions tried without a jury, the trial court is required to make specific findings of fact, state separately its conclusions of law, and then direct judgment in accordance therewith.” *Cardwell v. Henry*, 145 N.C. App. 194, 195, 549 S.E.2d 587, 588 (2001) (internal quotation marks and citations omitted). The trial court’s findings of fact must include “specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.” *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). Put another way, the trial court must make “specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.” *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). “Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts.” *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). The trial court’s conclusions of law are reviewed *de novo*, wherein this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

B. Violation of the RRAA

Plaintiff-Landlord first contends the trial court erred in granting Defendant-Tenant’s claim for rent abatement in violation of the RRAA. We agree.

Specifically, Plaintiff-Landlord challenges the trial court’s conclusion of law No. 3, which states:

3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide

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detector. [Defendant-Tenant] is therefore entitled to rent abatement[.]

This singly-enumerated conclusion actually contains two legal conclusions: first, that Plaintiff-Landlord violated the RRAA; second, that Defendant-Tenant is entitled to rent abatement. We therefore discuss each conclusion separately.

Pursuant to the RRAA, codified at N.C. Gen. Stat. §§ 42-38 to -49 (2013), “a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation. The implied warranty of habitability is co-extensive with the provisions of the Act.” *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 366, 355 S.E.2d 189, 192 (1987) (citation omitted). The RRAA requires landlords to provide fit premises and imposes upon them the following duties:

(a) The landlord shall:

- (1) Comply with the current applicable building and housing codes[] . . . to the extent required by the operation of such codes[.]
- (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
- (3) Keep all common areas of the premises in safe condition.
- (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

N.C. Gen. Stat. § 42-42(a)(1)-(4) (2013). The RRAA provides an affirmative cause of action to a tenant for recovery of rent due to a landlord’s breach of the implied warranty of habitability. *See, e.g., Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694 (1987) (“Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord’s noncompliance with [N.C. Gen. Stat.] § 42-42(a)” (citation omitted)); *see also Allen v. Simmons*, 99 N.C. App. 636, 644, 394 S.E.2d 478, 482 (1990) (“Tenants may bring an action seeking damages for breach of the implied warranty

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of habitability and may also seek rent abatement for their landlord's breach of the statute.").

The restitutionary remedy of rent abatement compensates tenants for defective conditions of a premises which render it unfit for human habitation. *See Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193 (noting that rent abatement is "in the nature of a restitutionary remedy[]"). This Court has held:

[A] tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with [N.C. Gen. Stat. §] 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

Id. at 371, 355 S.E.2d at 194 (citations omitted). However, N.C. Gen. Stat. § 42-42(a) also imposes affirmative duties upon landlords to ensure premises are fit for human habitation. Pertinent to the instant case, the RRAA requires landlords:

(5) *Provide operable smoke alarms[]* . . . and install the smoke alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke alarm is operable and in good repair at the beginning of each tenancy. . . .

. . . .

(7) *Provide a minimum of one operable carbon monoxide alarm per rental unit per level[]* . . . and install the carbon monoxide alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. A landlord that installs one carbon monoxide alarm per rental unit per level shall be deemed

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to be in compliance with standards under this subdivision covering the location and number of alarms. The landlord shall replace or repair the carbon monoxide alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a carbon monoxide alarm is operable and in good repair at the beginning of each tenancy. . . .

N.C. Gen. Stat. § 42-42(a)(5), (7) (2013) (emphasis added). Breaches of provisions of the RRAA such as these, included within the implied warranty of habitability, can be remedied by retroactive rent abatement. However, the quantity of damages must be appropriate. We recognize the importance of ensuring operable smoke alarms and carbon monoxide alarms in rental units. Yet the amount a landlord is liable for a violation of N.C. Gen. Stat. § 42-42(a)(5) or (7) requires an evaluation of fair market value determined with more specificity than was calculated by the trial judge.

In the instant case, in reviewing the trial court's decision de novo, we hold its findings of fact do not support its conclusion that Defendant-Tenant is entitled to rent abatement. Therefore we reverse.

While N.C. Gen. Stat. § 42-42(a)(5) and (7) impose upon landlords the duty to provide operable smoke and carbon monoxide alarms, the duty is triggered only if a landlord is notified of its needed repair or replacement, or if it is the beginning of a tenancy. Here, Defendant-Tenant never notified Plaintiff-Landlord in writing, as required, the alarm provided by Mr. Kluth was defective or inoperable. Regardless of whether Plaintiff-Landlord discovered during the second pre-sale inspection the property did not have an alarm, there was no finding Plaintiff-Landlord knew or should have known the alarm provided by Mr. Kluth was not operable. Nor was there a finding Plaintiff-Landlord was notified about its inoperability. Furthermore, the trial court failed to make any finding as to when, if ever, a new tenancy was created after Plaintiff-Landlord became the new property owner and manager. Lacking the essential findings that Defendant-Tenant notified Plaintiff-Landlord the alarm provided by Mr. Kluth needed replacement or repair, or that a new tenancy was created after Plaintiff-Landlord became the property's owner and manager, the trial court's findings of fact do not support its conclusion that Plaintiff-Landlord breached the RRAA.

As to the award of rent abatement, the trial court did not articulate its rationale with any specificity in declaring how Plaintiff-Landlord's

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alleged failure to verify the property had an operable smoke alarm and carbon monoxide alarm—without more—entitles Defendant-Tenant to a restitutionary remedy such as rent abatement. The trial court made no finding that the premises was unfit or uninhabitable during the period in which Defendant-Tenant paid rent. There was no finding or articulation supporting the value of the premises in its “uninhabitable” state, other than Defendant-Tenant’s testimony his apartment’s fair market value dropped \$200.00, when considering all issues he alleged were breaches of the implied warranty of habitability.

We recognize that in *Cotton v. Stanely*, 86 N.C. App. 534, 358 S.E.2d 692 (1987), a case decided prior to the enactment of either provision at issue, this Court held indirect evidence of fair rental value, such as a tenant’s testimony as to his belief of the “as is” fair rental value of the premises, is sufficient to support a calculation of rent abatement damages to compensate for a landlord’s violation of N.C. Gen. Stat. § 42-42(a). *Id.* at 539, 358 S.E.2d at 695. This Court in *Cotton* held “[a] party is not required to put on direct evidence to show fair rental value,” as a fact-finder is able to “[f]rom their own experience with living conditions[.]” determine the “as is” fair rental value of the property to calculate an appropriate damage award for a tenant due to a landlord’s violation of the RRAA, as it was enacted at the time. *Id.* In *Cotton*, this Court concluded a landlord who breached the RRAA “[would] be liable for the difference between the fair rental value of the units ‘as is’ and the units’ fair rental value ‘as warranted,’ for the period between the expiration of a reasonable opportunity to repair after notice to the [landlord] and the date repairs were made, plus any special and consequential damages alleged and proven.” *Id.* at 539, 358 S.E.2d at 695-96.

Here, Defendant-Tenant testified as to what he perceived was the property’s fair market value in its allegedly dilapidated condition, which included a flooded basement that occurred “at least 50 times,” a broken back step, frequent electrical shortages, inoperable bedroom windows, a busted pipe in the kitchen that caused water seepage for three to four months, mold in the kitchen and bedroom walls, a hole in the apartment that rats entered through, and an uneven floor. Although the trial judge concluded Plaintiff-Landlord did not breach the RRAA as to these other issues—as Defendant-Tenant failed to provide proper written notice and reasonable access to Plaintiff-Landlord to conduct an inspection—the

2. N.C. Gen. Stat. § 42-42(a)(5) became effective in 1996. 1995 N.C. Sess. Laws 189, 191-92, ch. 111, § 2. N.C. Gen. Stat. § 42-42(a)(7) became effective in 2010. 2008 N.C. Sess. Laws 950, 953-54, ch. 219, § 2.

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trial judge determined Defendant-Tenant should be entitled to \$150.00 in rent abatement for each month Plaintiff-Landlord allegedly violated the RRAA by failing to verify the operability of the alarm. While this calculation is markedly difficult, the trial judge provided no basis for how he reached it, other than “[i]n the totality, . . . the Court [extracted \$150.00] out of the \$200.00 that [Defendant-Tenant] cited, [and] decided that was appropriate.” We can discern no rationale for how \$150.00 per month in rent abatement is an appropriate calculation under these facts, or how a restitutionary remedy such as rent abatement would be appropriate for an alleged violation of N.C. Gen. Stat. § 42-42(a)(5) or (7) alone.

In summary, lacking these and other specific findings of facts essential to support its conclusions Plaintiff-Landlord breached the RRAA and Defendant-Tenant is entitled to rent abatement, the trial court’s judgment must be reversed. Because we conclude the trial court’s findings do not support its conclusion Plaintiff-Landlord breached the RRAA, Defendant-Tenant’s claims for rent abatement and UDTP, as well as the award of trebled damages and attorney’s fees pursuant to UDTP, necessarily fail.

III. Conclusion

Based upon the foregoing and our review of the record, we reverse the trial court’s judgment.

REVERSED.

Judges Stephens and Tyson concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 AUGUST 2015)

EASLEY v. TLC COS. No. 15-62	N.C. Industrial Commission (Y10014)	Affirmed
FIELDS v. FIELDS No. 14-1204	New Hanover (12CVS1299)	Partial summary judgment affirmed; partial new trial
HARDISON v. GOODYEAR TIRE & RUBBER CO. No. 14-1391	N.C. Industrial Commission (X81052)	Affirmed
IN RE N.C. No. 15-320	Nash (13JT16-21)	Affirmed
IN RE N.N.N. No. 15-229	Wake (14JA234-237)	Affirmed
IN RE Z.D.N.T. No. 15-177	Craven (13JT6)	Affirmed
LOUIS v. SHRUM No. 14-1410	Lincoln (14CVS0596)	Affirmed
MOORE v. MOHAWK INDUS., INC. No. 14-1058	N.C. Industrial Commission (546801)	Affirmed
ODOM v. KELLY No. 15-38	Wake (14CVS3200)	Affirmed in part, reversed in part, and remanded.
QUALITY BUILT HOMES INC. v. TOWN OF CARTHAGE No. 15-115	Moore (13CVS1264)	Affirmed
SHOEHEEL FARMS v. CITY OF LAURINBURG No. 14-1089	Scotland (14CVS23)	Dismissed
STATE v. FULLARD No. 15-93	Forsyth (12CRS54625) (12CRS6418)	No Error
STATE v. GEMEILLE No. 15-70	Wake (13CRS201648)	No Error

STATE v. HARDIN No. 14-1296	Guilford (13CRS24476) (13CRS76339)	No Error
STATE v. HARDING No. 15-148	Cumberland (08CRS68715)	Affirmed
STATE v. KEEL No. 15-69	Pitt (09CRS61566)	Vacated and Remanded
STATE v. McKEITHEN No. 15-223	Moore (14CR52428)	Affirmed
STATE v. OWLE No. 14-1373	Jackson (08CRS81)	Affirmed
STATE v. PUTNAM No. 14-1304	Cleveland (12CRS51187) (12CRS847)	No Error
STATE v. ROSS No. 15-87	Cleveland (08CRS4060-61)	Vacated and Remanded
STATE v. SELLERS No. 14-1272	Wake (12CRS218675) (12CRS218676)	No error in part; remanded for resentencing.
STATE v. SELLERS No. 15-10	Stokes (13CRS50279) (14CRS88)	No prejudicial error
STATE v. SELLS No. 14-1163	Stanly (09CRS51269) (09CRS51270)	No Prejudicial Error
STATE v. SKINNER No. 14-1262	Pitt (11CRS2396)	No error in part; Dismissed in part
STATE v. STANLEY No. 14-1347	Johnston (13CRS52974-75)	No Error
STATE v. STITT No. 14-1200	Mecklenburg (12CRS233826) (13CRS26981) (13CRS8135)	No Error
STATE v. WARD No. 15-225	Wilson (13CRS54026) (14CRS265) (14CRS52585)	Dismissed

THOMPSON v. BANK OF AM., N.A. No. 15-20	Mecklenburg (13CVS20158)	Dismissed in part; Affirmed in part
TRABER v. BANK OF AM. No. 14-1028	Polk (13CVS129)	Affirmed
TYSON v. N.C. DEPT OF TRANSP. No. 14-1357	Beaufort (12CVS985)	Affirmed
ZUROSKY v. SHAFFER No. 14-954 R	Mecklenburg (09CVD30462)	Reversed and Remanded

CUMBERLAND CNTY. HOSP. SYS., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[242 N.C. App. 524 (2015)]

CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR VALLEY
HEALTH SYSTEM AND HOKE HEALTHCARE, LLC, PETITIONERS

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH
SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT

AND

FIRSTHEALTH OF THE CAROLINAS, INC. d/b/a FIRSTHEALTH MOORE REGIONAL
HOSPITAL, RESPONDENT-INTERVENOR

No. COA14-1376

Filed 18 August 2015

**1. Hospitals and Other Medical Facilities—certificate of need—
no-review decision—capable of repetition yet evading review**

In an appeal from the dismissal of a contested case against the North Carolina Department of Health and Human Services (DHHS) disputing the decision that a hospital was not required to obtain a new certificate of need, the Court of Appeals held that the Administrative Law Judge erred by dismissing the case as moot. DHHS's discretionary withdrawal of a no-review decision was an action capable of repetition yet evading review.

**2. Hospitals and Other Medical Facilities—certificate of need—
temporary reallocation of inpatient and emergency services**

In an appeal from the dismissal of a contested case against the North Carolina Department of Health and Human Services (DHHS) disputing the decision that a hospital was not required to obtain a new certificate of need (CON), the Court of Appeals held that the Administrative Law Judge did not err by dismissing the case for failure to state a claim upon which relief could be granted. The hospital was not required to obtain a new CON to reallocate the ratio of inpatient and emergency services on a temporary basis to meet fluctuations in demand because the hospital did not add a new institutional health service, change the scope of services, or fail to materially comply with the existing CON.

Appeal by Petitioners from final decision and order of dismissal entered 21 August 2014 by Administrative Law Judge Augustus B. Elkins, II. Heard in the Court of Appeals 21 May 2015.

K&L Gates LLP, by Gary S. Qualls, Susan K. Hackney, Steven G. Pine, and Colleen M. Crowley, for petitioners-appellants.

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Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for respondent-appellee CON section.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Denise M. Gunter, and Candace S. Friel, for respondent-appellee FirstHealth.

INMAN, Judge.

The appeal in this case arises from a dispute over the Department of Health and Human Services' decision that a hospital was not required to obtain a new certificate of need in order to reallocate the ratio of inpatient and emergency services on a temporary basis to meet fluctuations in demand, where the hospital did not propose to increase or decrease its facility, equipment, or expenditures. We hold that, based on the record before us, a new certificate of need was not necessary because the hospital did not add a new institutional health service, change the scope of services previously approved in a certificate of need, or fail to materially comply with the existing certificate of need.

Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System and Hoke Healthcare, LLC (jointly, "Cape Fear" or "Petitioners"), appeal from the Administrative Law Judge's ("ALJ's") final decision dismissing Cape Fear's contested case against the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("DHHS" or "the Agency") and respondent-intervenor FirstHealth of the Carolinas, d/b/a FirstHealth Moore Regional Hospital ("FirstHealth") (jointly, "Respondents"). The ALJ concluded (1) that the Office of Administrative Hearings ("OAH") lacked subject matter jurisdiction to determine the controversy because the case had been rendered moot and, in the alternative, (2) that Cape Fear's petition failed to state any claim upon which relief could be granted. On appeal, Petitioners argue that the ALJ erred in each of these conclusions and in dismissing their petition.

After careful review, we conclude that the matter was not subject to dismissal on mootness grounds but that the petition was fatally deficient on the merits. Accordingly, we affirm the dismissal.

Background

In April 2012, DHHS issued a certificate of need ("CON") to FirstHealth to construct a hospital in Hoke County ("FirstHealth Hoke") with eight inpatient or "acute care" beds, one operating room, and an Emergency

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Department (“ED”) containing eight ED treatment rooms. The hospital opened in October 2013. As of February 2015, when Petitioners’ appeal to this Court was filed, FirstHealth Hoke was the only hospital and the only ED in Hoke County.¹

In its CON application, submitted in 2010, FirstHealth projected a need of 25 ED visits per day; however, according to FirstHealth, ED visits at FirstHealth Hoke have never been below 30 per day since its opening in 2013, peaking at 91 visits on Christmas Day, 2013. In 2014, the hospital continued experiencing ED visit volumes nearly four times higher than originally projected, but because it only operated eight ED treatment rooms, an increased number of patients left without being seen. In an effort to relieve this disparity, FirstHealth sent a request letter (“No Review Request”) to DHHS in February 2014 seeking permission to use any available inpatient beds for overflow ED treatment on a temporary, as-needed basis. The No Review Request did not propose adding equipment or increasing the scope of services permitted by FirstHealth’s CON. Cape Fear opposed FirstHealth’s No Review Request in comments filed with DHHS on 14 March 2014.²

Over Cape Fear’s objection, DHHS on 21 March 2014 issued its decision (“No Review Decision”) approving the No Review Request, concluding that the proposal described in FirstHealth’s correspondence “is not governed by, and therefore does not currently require, a certificate of need.” DHHS provided notice of its decision to Cape Fear on 10 April 2014.

Cape Fear challenged DHHS’s decision in a petition filed in the OAH on 21 April 2014, commencing a contested case proceeding. FirstHealth withdrew its No Review Request from DHHS on 6 May 2014 and obtained permission from the ALJ to intervene in the proceeding on 13 May 2014. On 28 May 2014, DHHS withdrew its No Review Decision, which was the subject of Cape Fear’s petition.

On 30 May 2014, DHHS and FirstHealth jointly filed a motion to dismiss the contested case proceeding. The ALJ issued a final decision on

1. As noted in the ALJ decision, Petitioner Hoke Healthcare already had a CON to develop its own hospital in Hoke County, but that hospital had not yet opened.

2. Cape Fear has unsuccessfully opposed FirstHealth in two other recent cases. See *Surgical Care Affiliates, LLC v. N.C. Dep’t of Health & Human Servs.*, 2014 WL 5770252 (Oct. 21, 2014) (unpublished), *disc. rev. denied*, __ N.C. __, 722 S.E.2d 860 (2015); *Cumberland Cnty. Hospital Sys., Inc. v. N.C. Dep’t of Health & Human Servs.* __ N.C. App. __, 764 S.E.2d 491 (2014), *disc. rev. denied*, __ N.C. __, 772 S.E.2d 861 (2015).

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21 August 2014 dismissing the matter on two alternative grounds: (1) concluding that the OAH lacked subject matter jurisdiction over the case because it was moot and (2) further concluding that Cape Fear had failed to state a claim upon which relief could be granted. Cape Fear filed timely notice of appeal.

Standard of Review

In certificate of need cases, an appeal from a final OAH decision proceeds directly to this Court. *AH North Carolina Owner LLC v. N.C. Dep't of Health and Human Servs.*, __ N.C. App. __, __, 771 S.E.2d 537, 541-42 (2015); *see also* N.C. Gen. Stat. §§ 7A-29(a), 131E-188(b) (2015).

In reviewing a CON determination, [m]odification or reversal of the Agency's decision is controlled by the grounds enumerated in [N.C. Gen. Stat.] section 150B-51(b); the decision, findings, or conclusions must be:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary or capricious."

Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs., 205 N.C. App. 529, 534, 696 S.E.2d 187, 192 (2010) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005)). "The first four grounds for reversing or modifying an agency's decision . . . are law-based inquiries. On the other hand, [t]he final two grounds . . . involve fact-based inquiries." *Id.* at 535, 696 S.E.2d at 192 (quoting *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 42, 684 S.E.2d 914, 920 (2009)). "In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health and Human Servs.*, __ N.C. App. __, __, 762 S.E.2d 468, 470 (2014) (quoting *Diaz v. Div. of Social Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006)). In conducting *de novo* review, this Court considers matters anew and freely substitutes its

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own judgment for that of the administrative body. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004). In conducting “whole record” review, we must examine all the record evidence in order to determine whether there is substantial evidence to support the agency’s decision. *Id.*

Accordingly, we review *de novo* the ALJ’s decision granting Respondents’ motion to dismiss for failure to state a claim upon which relief could be granted and dismissing the case as moot. We apply the whole record test in reviewing Petitioners’ claims that the ALJ failed to take all of their factual allegations as true and reached conclusions of law unsupported by the findings of fact.³

Analysis

I. Mootness

[1] We first address the conclusion below that the OAH lacked subject matter jurisdiction to hear Petitioners’ claim because the case was moot. Because we conclude that DHHS’s withdrawal of its No Review Decision falls within at least one exception to the mootness doctrine – as a measure capable of repetition, yet evading review – we decline to dismiss the case for mootness, and we will reach the merits of this appeal.

“A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Thus, the case at bar is moot if [an intervening event] had the effect of leaving plaintiff with no available remedy.” *Roberts v. Madison Cty. Realtors Ass’n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted). “[A] moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim[.]” *Yeager v. Yeager*, __ N.C. App. __, __, 746 S.E.2d 427, 430 (2013) (citations omitted). Moreover, “[i]f the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action” for lack of subject matter jurisdiction. *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation omitted).

One exception to the mootness doctrine permits our courts to address on the merits an otherwise moot claim where the case is “capable

3. While Petitioners make a passing reference to the “arbitrary or capricious” nature of the final decision, they do not support that argument with citation to any legal authority. Therefore, we deem this contention abandoned. *See* N.C. R. App. P. 28(b)(6) (2008) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”).

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of repetition, yet evading review.” *Ass’n for Home and Hospice Care of North Carolina, Inc. v. Div. of Medical Assistance*, N.C. Dep’t of Health and Human Servs., 214 N.C. App. 522, 525, 715 S.E.2d 285, 288 (2011) (quoting *Thomas v. N.C. Dep’t of Human Resources*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820–21 (1996)).⁴ Where a CON holder obtains through the administrative process an agency decision allowing it to reallocate its services, even within the scope of the existing certificate, any challenge to the agency decision would be rendered meaningless if the holder of the certificate and the agency could preclude appellate review by withdrawing the underlying request and agency decision.

The ALJ concluded in the decision below that the “capable of repetition, yet evading review” exception to the mootness doctrine was inapplicable because DHHS had withdrawn its No Review Decision and was unlikely to “issue the same decision again.” We disagree, concluding that the ALJ’s analysis of the exception criteria was too restrictive.

Two elements are required for the “capable of repetition, yet evading review” exception to apply: “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, __ N.C. App. __, __, 771 S.E.2d 920, 926 (2015) (quoting *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (2002)); see also *State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 422-23 (2012) (applying this exception to allow the appeal of a criminal defendant who had at most nine months in which to seek confinement credit from the trial court, and if unsuccessful, to file and fully litigate an appeal); *N.C. Council of Churches v. State*, 120 N.C. App. 84, 88-89, 461 S.E.2d 354,

4. Petitioners argue that three established exceptions to the mootness doctrine apply in the case at bar: the “capable of repetition, yet evading review” exception; a “public interest” exception, see *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (even if moot, a court may “consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution”); and a “voluntary cessation” exception, see *Shell Island Homeowners Ass’n v. Tomlinson*, 134 N.C. App. 286, 293, 517 S.E.2d 401, 405 (1999) (noting that “a defendant’s voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice.” (citation omitted)). Because it is sufficient for this Court to conclude that any one of the mootness exceptions applies, we need not address Petitioners’ alternative arguments on the question of mootness. See *In re Brooks*, 143 N.C. App. at 605-06, 548 S.E.2d at 751-52 (where state officials “argue[d] that at least three of the five exceptions to the mootness doctrine appl[ied],” the court “thoroughly reviewed the officers’ arguments and [found] that at least one of the exceptions applies, the public interest exception.”).

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357-58 (1995) (where group opposed to the death penalty had sought to hold several execution vigils throughout the preceding decade, there was “every reason to believe they intend to hold such vigils at future executions”).

DHHS’s revocation of its No Review Decision satisfies the first element required by the exception: the challenged action was too short in its duration to be fully litigated prior to its cessation or expiration. The No Review Decision was withdrawn 37 days after Cape Fear filed its contested case, and just two days before Respondents filed their motion to dismiss the contested case petition.

Because Petitioners are deemed “affected person[s]” by statutes governing state regulation of medical facilities, *see* N.C. Gen. Stat. § 131E-188(c), they possessed a statutory right to file a contested case challenging the No Review Decision. *See* N.C. Gen. Stat. §§ 131E-188(a)-(c) (“[A]ffected person[s]” entitled to contested case hearing “[a]fter a decision of the Department to issue, deny or withdraw a certificate of need or exemption” (emphasis added)); *see also Hospice at Greensboro, Inc. v. North Carolina Dep’t of Health and Human Servs.*, 185 N.C. App. 1, 17, 647 S.E.2d 651, 662 (2007) (“[T]he CON Section’s issuance of a ‘No Review’ letter is the issuance of an ‘exemption’ for purposes of section 131E-188(a). Accordingly . . . section 131E-188(b) confers jurisdiction on this Court to hear the incident appeal.”).

We also agree with Cape Fear that the second element of the exception – that the controversy is capable of repetition – is met in this case. The ALJ concluded that there is no expectation Cape Fear will be subject to the same action in the future, because that would require “FirstHealth . . . to write the same or substantially same letter again, and the Agency . . . to issue the same decision again.” However, we are not required to find that a future dispute will involve the exact same parties and circumstances before applying the exception. *See In re Jackson*, 84 N.C. App. 167, 170-71, 352 S.E.2d 449, 452 (1987) (applying the exception where a school board “and other local school boards” were likely to “be repeatedly subject to orders like the one in the case *sub judice*” in future cases involving student disciplinary proceedings) (first emphasis added); *cf. Crumpler v. Thornburg*, 92 N.C. App. 719, 723-24, 375 S.E.2d 708, 711-12 (1989) (exception did not apply where more than two years had passed since plaintiff was “arrested or refused a permit for a *similar* demonstration”) (emphasis added).

Respondents cite *Total Renal Care of N.C., LLC v. N.C. Dep’t of Health & Human Servs.*, 195 N.C. App. 378, 673 S.E.2d 137 (2009), in

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which this Court dismissed a CON challenge as moot, to support their proposition that the “capable of repetition, yet evading review” exception can apply only if there is a reasonable expectation that Cape Fear will face precisely the same action again. *Total Renal Care* is distinguishable from the case at bar. It did not involve the issuance of a no-review decision. Instead, it concerned DHHS’s approval of a provider’s CON application to construct a new dialysis facility. *Id.* at 382-83, 673 S.E.2d at 140. The CON approval was challenged by a competitor. *Id.* The challenge became moot, however, once the new facility opened, because DHHS was “not authorize[d] . . . to withdraw a CON after the project or facility for which a CON was issued is complete or becomes operational.” *Id.* at 381, 673 S.E.2d at 140 (citing N.C. Gen. Stat. § 131E-189). Therefore, because there was “no reasonable expectation that [the petitioner] would be subjected to the *same action* again,” the Court held that the “capable of repetition, yet evading review” exception did not apply. *Id.* at 389, 673 S.E.2d at 145.

In contrast to the withdrawal of a CON, which is regulated by statute as noted in *Total Renal Care*, DHHS has discretionary authority to withdraw no-review decisions, as it did here. As this Court noted in *Hospice at Greensboro*, “[t]he ‘No Review’ process is not set forth in statute or rule, but is a practice DHHS developed over time,” based on its understanding of this Court’s prior caselaw. *Hospice at Greensboro*, 185 N.C. App. at 6, 647 S.E.2d at 655. There is no indication before us that DHHS plans to change its no-review process, including its ability to withdraw no-review decisions. Since DHHS will continue to accept and evaluate no-review requests, issue no-review decisions, and maintain the ability to later withdraw those decisions, it is reasonable to expect it will exercise its discretion in making those decisions in the future, potentially for the same parties before us. It is also reasonable to expect that there will be future challenges to no-review decisions as exemptions, and because Petitioners are among several types of plaintiff specifically entitled to file such challenges, *see* N.C. Gen. Stat. § 131E-190(h), it is reasonable to expect that future challenges will involve similarly situated parties. Despite Respondents’ contention to the contrary, *Total Renal Care* does not require us to examine *only* the likelihood of the exact same action occurring in the future. The *Total Renal Care* Court, in support of its mootness analysis, relied on *Crumpler*, 92 N.C. App. at 723, 375 S.E.2d at 711. *Crumpler* in turn relied on *In re Jackson*, 84 N.C. App. at 170-71, 352 S.E.2d at 452 – a decision that, as noted above, considered similarly situated parties in applying the “capable of repetition, yet evading review” exception to the mootness doctrine.

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Furthermore, this Court has previously declined to extend the mootness doctrine to a case in which the no-review process was exercised by DHHS. In *Hospice & Palliative Care Charlotte Region v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 109, 648 S.E.2d 284 (2007), a hospice care provider received a favorable no-review decision from DHHS, advising that its proposal to open a new “branch office” did not require a new CON. *Id.* at 110-11, 648 S.E.2d at 285. That decision was subsequently overturned by a final Agency decision. *Id.* However, five days after receiving the initial no-review decision, and four days before the contested case was filed, the provider applied for and received a license to open the branch office, which it then did. *Id.* On appeal, the provider argued that the case became moot once the new office was “properly licensed and fully operational.” *Id.* This Court rejected the “broad proposition” that the mere fact of licensure and subsequent office opening mooted the contested case and prevented judicial review to determine whether the action at issue (opening a branch office) was in fact a new institutional health service. *Id.* at 113-14, 648 S.E.2d at 287. Dismissing the appeal as moot “would accelerate the unlawful development of new institutional health services, encouraging health service providers to make questionable projects ‘fully operational’ *before an ‘affected party’ has time to challenge the action.*” *Id.* at 113, 648 S.E.2d at 287 (emphasis added).

A conclusion that this case is moot without exception would essentially immunize DHHS from court review of any future no-review decision that it subsequently withdraws. The General Assembly clearly intended to enable certain parties to challenge DHHS exemptions, which we have held include no-review decisions. *See* N.C. Gen. Stat. § 131E-188(a), (c); *Hospice at Greensboro*, 185 N.C. App. at 17, 647 S.E.2d at 662. DHHS cannot evade court review merely by rescinding such decisions amid pending litigation. This would nullify the statutory language granting a right of action to the enumerated “persons aggrieved” who believe a particular no-review decision violates the CON law. Accordingly, we hold that DHHS’s discretionary withdrawal of a no-review decision is an action capable of repetition, yet evading review, and therefore Cape Fear’s challenge to the No Review Decision at issue in this case was improperly dismissed as moot.

Review on the Merits

[2] Petitioners argue that the ALJ erred in dismissing their case for failure to state a claim upon which relief could be granted pursuant to Rule

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12(b)(6) of the North Carolina Rules of Civil Procedure.⁵ We disagree because Petitioners have not pointed to any statutory language showing, under the facts presented, that FirstHealth's No Review Request required a new CON, or exceeded or invalidated its existing CON.

A. New Institutional Health Service

First, Petitioners claim that the changes proposed in FirstHealth's No Review Request amounted to a "new institutional health service," requiring a new CON pursuant to N.C. Gen. Stat. § 131E-178(a). Specifically, Petitioners allege that the temporary use of inpatient beds for ED treatment should be considered a new institutional health service under N.C. Gen. Stat. § 131E-176(16)e. We disagree, because the proposed changes in service do not fall within the statutory definition of a "new institutional health service."

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted). Moreover, "an agency's interpretation of a statute that it is tasked with administering should be accorded some deference by the reviewing tribunal." *AH North Carolina Owner LLC*, __ N.C. App. at __, 771 S.E.2d at 547.

"No person shall offer or develop a new institutional health service without first obtaining a certificate of need[.]" N.C. Gen. Stat. § 131E-178(a). Section 131E-176(16)e defines a new institutional health service, in part, as:

5. Petitioners also argue that they possess an absolute statutory right under N.C. Gen. Stat. § 131E-188(a) to a full evidentiary hearing and that it was thus improper for the ALJ to grant Respondents' Rule 12(b)(6) motion. We find guidance in *Cumberland County Hosp. System, Inc.*, __ N.C. App. at __, 764 S.E.2d at 495. In that case, Cape Fear argued, as it does now, that the ALJ erred in granting a dispositive prehearing motion because Cape Fear possessed an absolute right to a contested case hearing under section 131E-188(a). This Court disagreed, holding that section 131E-188(a) must be considered in light of Chapter 150B of the General Statutes. The Court noted that among the applicable provisions in Chapter 150B, N.C. Gen. Stat. § 150B-23(a)'s "enumeration of specific requirements for a contested case petition indicates that the right to an evidentiary hearing is *contingent upon a valid petition*." *Id.* (emphasis added). The Court also observed that N.C. Gen. Stat. § 150B-33(b)(3a) provides that an ALJ may "[r]ule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure." *Id.* Respondents' motion to dismiss pursuant to Rule 12(b)(6) in this case, like the respondents' motion for summary judgment in *Cumberland County I*, is a prehearing motion authorized by the Rules of Civil Procedure. Accordingly, as before, we reject Cape Fear's argument that the ALJ lacked authority to rule on a dispositive prehearing motion. *See id.* ("Cape Fear's position would lead to the absurd result that an appellant would have an absolute right to a full evidentiary hearing, even if its petition were devoid of any allegations that might justify relief.").

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A change in project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

N.C. Gen. Stat. § 131E-176(16)e.

Petitioners argue that the first sentence in the above language requires a new CON if *any* change is proposed to a project within one year after the project's completion. The second sentence, however, defines "change in project" in narrower and explicit terms: either (a) deviation of more than fifteen percent of the approved capital expenditure, or (b) addition of a health service in the facility.⁶

The ALJ's findings that FirstHealth's No Review Request did not propose (a) a change in expenditures, or (b) the addition of a new health service, are supported by competent evidence in light of the whole record, and those findings in turn support the ALJ's legal conclusion that FirstHealth did not propose a new institutional health service requiring a CON.

N.C. Gen. Stat. § 131E-176(9a) defines "health service" as "an organized, interrelated medical, diagnostic, therapeutic, and/or rehabilitative activity that is integral to the prevention of disease or the clinical management of a sick, injured, or disabled person." Rather than proposing the addition of a new "health service," FirstHealth merely sought to expand, on an as-needed and temporary basis, its capacity to offer the same ED services it had always provided to address an overflow issue. The expansion of a presently offered health service is not equivalent to the addition of a new health service. *See Cape Fear Mem'l Hosp. v. N.C. Dep't of Human Resources*, 121 N.C. App. 492, 494, 466 S.E.2d 299, 301

6. Petitioners point to language in DHHS's No Review Decision to argue that "the Agency includes other changes in its own definition [of a 'change in project'] and does not limit the changes to those enumerated." We note that DHHS is bound by the statutory definition, which it has no authority to expand. *See High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (a state administrative agency " 'possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority' " (quoting *Lee v. Gore*, 365 N.C. 227, 230, 717 S.E.2d 356, 359 (2011))).

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(1996) (in enacting the CON law, “the legislature clearly did not intend to impose unreasonable limitations on maintaining . . . *or* expanding . . . presently offered health services” (emphasis in original)).

In conjunction with this argument, Petitioners allege that the ALJ erred by not treating all of their factual allegations regarding the nature of FirstHealth’s No Review Request as true. *See Burgess*, 326 N.C. at 209, 388 S.E.2d at 136 (“In ruling upon a Rule 12(b)(6) motion, the trial judge must treat the allegations of the complaint as admitted.”). Specifically, they contend that the ALJ failed to take the following allegations as true: (1) that “the Agency did not limit the length of time that FirstHealth could use its acute care beds as ED beds,” and (2) that “the Agency failed to limit the number of acute care beds[.]”

There is nothing in the final decision indicating that the ALJ did not treat as true the allegations that there was no specific limit on the time or number of beds to be used. Petitioners infer that because neither FirstHealth nor DHHS specified a concrete limit on the number of inpatient beds to be used as ED overflow or the length of time that this practice could continue, DHHS essentially gave FirstHealth permission to permanently convert any number of its inpatient beds into ED beds. While the ALJ was required to treat all factual allegations as true, it was not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Good Hope Hosp., Inc. v. N.C. Dep’t of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005).

Petitioners’ inference is not reasonable in light of the whole record; therefore, the ALJ was not required to accept it as true. *See id.* As the ALJ noted, the No Review Request specifically stated that the proposal “will be temporary while FirstHealth considers other long-term actions[.]” Furthermore, the ALJ correctly found that the No Review Decision “specifically referenced the fact that this proposal by FirstHealth was temporary.” These findings are supported by substantial evidence, and the mere absence of a specific time limit does not mean that FirstHealth’s proposal was not a temporary one.

Accordingly, we affirm the ALJ’s legal conclusion that FirstHealth’s proposal did not constitute a “new institutional health service” requiring a CON.

B. CON Scope

Petitioners also contend that DHHS’s No Review Decision violated N.C. Gen. Stat. § 131E-181(a), which provides that “[a] certificate of need

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shall be valid only for the defined scope, physical location, and person named in the application.” Because FirstHealth’s adjustment in services does not exceed the scope of its CON, we affirm the ALJ’s decision overruling this argument.

Petitioners maintain that the Agency’s No Review Decision “permitted FirstHealth to operate outside the scope of its CON, [by] allowing FirstHealth to use any or all of its acute care beds as ED beds for an undefined length of time.” This, Petitioners claim, violated the plain language of N.C. Gen. Stat. § 131E-181(a), thereby requiring a new CON. We disagree.

Again, we conclude that Petitioners’ inferences are unwarranted in light of the whole record. FirstHealth’s 2012 CON approved a hospital with eight acute care beds, one operating room, 24-hour ED, with eight ED rooms, diagnostic imaging, and laboratory and pharmacy services. FirstHealth built the hospital according to the terms of the CON. The No Review Request explicitly stated that FirstHealth only sought to use whichever inpatient beds were “available” (indicating a continuation of inpatient services) for ED treatment on a temporary basis “while FirstHealth considers other long-term actions to address the dramatic increase in [ED] visits.”

Nothing in the CON law restricts the type of action FirstHealth proposed in its No Review Request, i.e., temporary use of unoccupied inpatient beds as ED treatment beds pending a long-term solution. Contrary to Cape Fear’s contention that the No Review Decision permitted FirstHealth to “operate *inter alia* a freestanding ED” with no inpatient beds, FirstHealth never stated or implied it intended to stop offering acute care services at FirstHealth Hoke. The No Review Request merely proposed a temporary measure to ameliorate an urgent problem, in a way that would not circumscribe its inpatient services but would help alleviate emergency room overcrowding.

Accordingly, we affirm the ALJ’s conclusion that FirstHealth’s proposal did not exceed the scope of its CON.

C. Material Compliance

Finally, Petitioners allege that the Agency’s No Review Decision permitted FirstHealth to operate a “materially different facility” from that described in its original CON, in violation of N.C. Gen. Stat. § 131E-181(b). We disagree.

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Section 131E-181(b) provides in pertinent part that “[a] recipient of a certificate of need . . . is required to materially comply with the representations made in its application for that certificate of need.” N.C. Gen. Stat. § 131E-181(b). In assessing whether the recipient of a CON is operating a service which materially differs from representations made in its application, section 131E-181(b) specifies “cost increases to the recipient, or its successor,” as a relevant factor.

We note again that FirstHealth’s No Review Request did not propose any new expenditures or change in operating costs in order to implement the short-term measure it described. Further, neither the No Review Request nor the Agency’s decision suggested that FirstHealth intended to stop offering inpatient services altogether at FirstHealth Hoke, and contrary to Petitioners’ repeated assertions, it is clear that both FirstHealth and DHHS understood the proposal to be a stopgap fix rather than a permanent solution.

We conclude that FirstHealth’s proposal in the No Review Request materially complied with the representations made in the 2012 CON, and Petitioners have failed to state a claim under N.C. Gen. Stat. § 131E-181(b).

Conclusion

For the foregoing reasons, we affirm the ALJ’s final decision and order of dismissal.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

DOE v. ROMAN CATHOLIC DIOCESE OF CHARLOTTE

[242 N.C. App. 538 (2015)]

JOHN DOE 1K AND JOHN DOE 2K, PLAINTIFFS

v.

ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, DEFENDANT

No. COA15-102

Filed 18 August 2015

**Statutes of Limitations and Repose—abuse by priest—fraud—
failure to take steps to investigate claims**

The trial correctly granted summary judgment for defendant in an action for fraud arising from the sexual abuse of plaintiff John Doe 1K where the abuse occurred in 1977 and 1978 and plaintiff sued in 2011. Although plaintiff relied on the discovery rule and the contention that defendant had misrepresented that he would be safe under the supervision and care of the priest, plaintiff failed to exercise reasonable diligence in investigating his own claim. The alleged sexual abuse committed in this case is the type of event that triggers inquiry notice; moreover, this was not a case where plaintiff asserted any fraudulent concealment by defendant to hide wrongdoing after the fact.

Appeal by plaintiff from order entered 11 July 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 June 2015.

Tin Fulton Walker & Owen PLLC, by Sam McGee, for plaintiff-appellant.

McGuireWoods LLP, by Joshua D. Davey, L.D. Simmons, II, and Monica E. Webb, for defendant-appellee.

DIETZ, Judge.

Plaintiff John Doe 1K¹ sued the Roman Catholic Diocese of Charlotte for various tort claims stemming from sexual abuse allegedly committed by Father Kelleher, a Catholic priest affiliated with the Diocese, in 1977 and 1978. Doe concedes that he did not repress the memories of the abuse and has known of his injuries since they occurred.

1. John Doe 1K is a pseudonym used by Plaintiff to protect his privacy. Joe Doe 2K, another plaintiff at the trial court level, is not a party to this appeal.

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In 2011, more than 30 years after the alleged abuse, Doe sued the Diocese. His complaint relied on legal theories involving fraud—in essence, that before the abuse occurred, the Diocese misrepresented that Doe would be safe and free from sexual abuse under the supervision and spiritual care of Father Kelleher. Doe relies on fraud-related claims because they are subject to the “discovery rule,” which states that the statute of limitations does not begin to run until the plaintiff should have discovered the false statements in the exercise of reasonable diligence. Here, Doe argues that he could not have discovered that the Diocese lied to him until 2010, when Father Kelleher was arrested and other alleged victims came forward.

The trial court rejected this argument and entered summary judgment against Doe on the ground that his claims were barred by the statute of limitations. For the reasons discussed below, we agree. A plaintiff cannot rely on the discovery rule unless he has exercised reasonable diligence to discover the fraud. Here, Doe’s theory of liability rests on the Diocese’s false assurances in 1977 and 1978 that he would be safe with Father Kelleher. The very fact that Father Kelleher abused him, as Doe alleges, put him on notice that the Diocese’s assurances may have been false. But Doe concedes that, after he reached the age of majority in 1980, he did not do anything to investigate the Diocese. Doe also concedes that the Diocese never concealed anything from him or misrepresented its actions to him after the fact—indeed, Doe never had any contact with the Diocese again after the alleged abuse.

Moreover, the record indicates that Doe knew many years before his lawsuit that the Diocese’s alleged representations to him may have been false. For example, in 2006, Doe posted on an internet forum that he had been “molested” by a priest and wanted to “seek retribution from the catholic church.” This undercuts Doe’s claim that he had no reason to suspect the Diocese of wrongdoing, and to begin investigating his potential claims, until 2010 when he learned there were other victims of the same priest.

As a result, under settled North Carolina law, and consistent with every other state to address this issue, we hold that Doe’s claims are barred by the statute of limitations because Doe did not exercise reasonable diligence in investigating them after being put on inquiry notice that the Diocese’s representations to him may have been false. Accordingly, we affirm the trial court’s entry of summary judgment.

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Facts and Procedural History

The following recitation of the facts relies on evidence that is either undisputed or is disputed but viewed in the light most favorable to Plaintiff as the party opposing the motion for summary judgment. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). We recognize that the Diocese disputes many of these facts, but we must accept them as true for purposes of summary judgment. *Id.* As explained below, however, even when all facts are viewed in the light most favorable to Plaintiff, he cannot overcome the Diocese's statute of limitations defense as a matter of law.

Sometime around 1977, Plaintiff John Doe 1K was fourteen years old and having difficulty adjusting after his family's recent move to North Carolina. Doe's grandmother suggested that he meet with Father Kelleher, a priest affiliated with the Roman Catholic Diocese of Charlotte. Doe met Kelleher alone in the rectory at Our Lady of the Annunciation in Albemarle. During Doe's second meeting with Kelleher, Kelleher told him to lie down on the floor. Kelleher then knelt down next to him. They discussed Doe's family problems and then Kelleher began rubbing Doe's chest, arms, and legs. Kelleher then unbuttoned Doe's pants and massaged Doe's penis.

Doe met with Kelleher for counseling seven or eight times over a six to eight month period in 1977, and Kelleher molested him during four to six of those meetings. The abuse continued until Doe's family moved to Winston-Salem in early 1978. Doe did not tell anyone about his sexual abuse by Kelleher at the time because he was "terrified and ashamed." After being sexually abused by Kelleher, Doe suffered from increased emotional problems, including depression and anxiety, for which he sought medical treatment and counseling.

Although Doe did not report his abuse at the time, he testified that he always remembered the abuse and did not repress the memory. Doe also testified that no one employed by or speaking on behalf of the Church ever told him that he should not "speak up and report abuse by a priest."

In September 2005, Doe was hospitalized and reported "Physical/emotional/sexual abuse" by "father – priest." The hospital record notes that Doe reported the abuse "2 yrs. ago" to an "atty.," and the outcome was "statute ran out." At some point between 2005 and 2008, Doe contacted attorney Jeff Anderson in Minneapolis regarding possible civil claims against the Diocese. Anderson told Doe that "the statute of limitations had run out . . . a long time ago."

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In March 2006, Doe posted on an internet message board maintained by Survivors Network of Those Abused by Priests, writing:

i am searching for any information regarding Fr Joseph Kelleher. i was repeatedly abused and molested by this priest from age 14-15. i am trying to find out how to expose his crimes, and seek retribution from the catholic church. i have been told the statute of limitations in NC is 7 years more or less. my abuse occurred in 1976-1977.

i am wondering if there are more victims and if there has been any actino [sic] taken against this guy.

Around the same time, Doe also conducted internet research on the statute of limitations for civil claims against Kelleher and the Diocese.

In his deposition, Doe testified that at the time he made the March 2006 Survivors Network post, he knew that he had been abused by Kelleher, that he had been damaged by the abuse, and that he wanted to seek retribution against Kelleher and the Diocese. He stated that the only reason he had not filed a lawsuit before 2006 was that the lawyer he contacted would not take his case. He further testified that neither the Diocese nor Father Kelleher had done anything to prevent him from filing a lawsuit.

On 10 September 2009, Doe reported his sexual abuse by Father Kelleher to the Albemarle Police Department. Doe testified that he made the decision to report his abuse to the police “impulsively” after a “personal epiphany” and that his decision was not prompted by any new information or advice. Law enforcement arrested Kelleher on 8 July 2010. Following news reports of Kelleher’s arrest, other alleged victims came forward.

The day after he reported Father Kelleher to the police, Doe posted on a Survivors Network message board:

yesterday i started the process of filing charges in Albemarle, where the abuse occurred. i am now looking for an attorney to represent me. i know the statute of limitations has run out, but i intend to step forward and make it known what this f*** did. i want him to pay in any way possible.

At oral argument, the parties informed the Court that Father Kelleher died in 2014, before he had been convicted of any charges.

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On 28 September 2011, two years after Doe first reported his abuse claims to police, Doe filed a complaint against the Diocese. On 26 July 2012, Doe filed an amended complaint, asserting claims for constructive fraud, breach of fiduciary duty, fraud, and fraudulent concealment.² Doe's claims alleged that the Diocese "took advantage of and abused" its "relationship[] of trust and confidence with [Doe]," violated its fiduciary duty to provide a "reasonably safe and secure environment," breached its "duty to warn and to disclose and protect [Doe] from sexual abuse and exploitation," and "made false representations to and concealed material facts" from Doe.

During discovery, Doe testified in a deposition that he was not aware of any "fact or piece of information that the Diocese knew and concealed from" him that, had he known, would have enabled him to file his lawsuit earlier. When asked, "Did the Diocese misrepresent anything to you that caused you to delay in filing a lawsuit" and "Did the Diocese do or fail to do anything that caused you to delay in filing your lawsuit," Doe responded, "No." Doe testified that he "didn't interact with the Diocese whatsoever" after he was abused, and the Diocese had "no opportunity" to make misrepresentations to him after his alleged abuse. When asked why he delayed in investigating and filing his lawsuit against the Diocese, Doe stated, "there's really no way to tell why my brain worked that way."

On 20 December 2013, the Diocese filed a motion for summary judgment, arguing that Doe's claims accrued at the time he was abused, were tolled until he turned eighteen, and are now barred by the applicable statute of limitations. Doe argued in response that he could not reasonably have discovered his fraud- and misrepresentation-related claims against the Diocese until other alleged victims of Father Kelleher's abuse came forward. Doe also argued that equitable estoppel tolled the statute of limitations.

The trial court entered an order granting the Diocese's motion for summary judgment on 11 July 2014. In the same order, the trial court also granted several other motions brought by the Diocese to exclude evidence and testimony submitted by Doe, including the testimony of an expert on the Catholic Church who sought to testify about the Church's procedure and Canon law. Doe timely appealed the trial court's judgment.

2. Doe's complaint also included claims for negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, and intentional infliction of emotional distress, but Doe subsequently abandoned these claims.

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Analysis**I. Summary Judgment and Statute of Limitations**

Doe argues that his claims are not barred by the statute of limitations. To address this argument, we must first address Doe's theory of liability against the Diocese.

All of Doe's claims against the Diocese are fraud-related or misrepresentation-related claims. The gist of Doe's claims is that the Diocese falsely represented that Doe would be safe and free from sexual abuse while under the supervision and spiritual care of Father Kelleher. Doe contends that the Diocese hid knowledge of Father Kelleher's abusive nature from him to protect the church and its interests.

Doe's fraud and misrepresentation legal theories are critical to his case because Doe concedes that he has known about Father Kelleher's alleged abuse—and his resulting injuries—since that abuse occurred nearly forty years ago. As a result, Doe relies entirely on claims that are subject to the “discovery rule” with regard to the running of the statute of limitations. Under the discovery rule, each of Doe's claims has a limitations period that begins to run when the plaintiff first becomes aware of facts and circumstances that would enable him to discover the defendant's wrongdoing in the exercise of due diligence. *See Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005).

Doe argues that “[a]t the time of the abuse in 1977 and 1978, Plaintiff was not aware of any evidence suggesting that . . . the Diocese knew about and ignored Kelleher's pattern of abusing children.” Doe contends that he did not discover this information until 2010, when other victims of abuse by Father Kelleher came forward. “Only then,” according to Doe, “did Plaintiff become aware that Kelleher was a serial abuser with many victims.”

Doe's argument fails because the record demonstrates the he was on inquiry notice nearly three decades before these other victims came forward, but failed to exercise reasonable diligence in investigating his own claim. Under the discovery rule, a plaintiff has a duty to exercise reasonable diligence to discover the fraud or misrepresentations that give rise to his claim. *Forbis v. Neal*, 361 N.C. 519, 525, 649 S.E.2d 382, 386 (2007). Doe argues that there is a special relationship between him and the Diocese and that he would never assume the church would lie to him. But under North Carolina law, even when there is a special relationship between the plaintiff and the defendant, the duty of inquiry begins

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“when an event occurs to excite the aggrieved party’s suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud.” *Id.*

The alleged sexual abuse committed by Father Kelleher is the type of event that triggers this inquiry notice. As a number of other jurisdictions have acknowledged, when a plaintiff is abused by a priest affiliated with a particular diocese—as is the case here—that triggers the duty to investigate the diocese. *See, e.g., Colosimo v. Roman Catholic Bishop of Salt Lake City*, 156 P.3d 806, 811 (Utah 2007); *see also Kelly v. Marcantonio*, 187 F.3d 192, 200-01 (1st Cir. 1999); *Mark K. v. Roman Catholic Archbishop of Los Angeles*, 67 Cal. App. 4th 603, 612-13 (Cal. Ct. App. 1998); *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 774-75 (D.C. 1998); *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 273-77 (Ohio 2006); *Baselice v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d 270, 277-79 (Pa. Super. Ct. 2005). Put another way, because Doe’s theory of liability rests on the Diocese’s false assurances that he would be safe with Father Kelleher, the very fact that he was not safe put Doe on inquiry notice that the Diocese’s representations may have been false.

Importantly, this is not a case where Doe asserts any fraudulent concealment by the Church to hide its wrongdoing after the fact. Other jurisdictions have recognized that fraudulent concealment precludes a claim that the victim failed to investigate his claims with reasonable diligence. *See, e.g., Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 463 (Tenn. 2012). Here, however, Doe conceded under oath that the Diocese did not conceal any facts from him. In Doe’s deposition testimony, when asked, “Did the Diocese misrepresent anything to you that caused you to delay in filing a lawsuit” and “Did the Diocese do or fail to do anything that caused you to delay in filing your lawsuit,” Doe responded, “No.” No other evidence in the record supports a claim of concealment; indeed, as explained below, Doe never had *any* contact with the Diocese following the alleged abuse. Thus, under settled statute of limitations precedent, Doe was on inquiry notice when he reached the age of majority and was required to take reasonable steps to investigate the representations made by the Diocese.

The record also establishes that Doe did not take reasonable steps to investigate his potential claims. Doe concedes that, after he reached the age of majority, he did not do *anything* to investigate the Diocese. Doe testified that he “didn’t interact with the Diocese whatsoever” after he was abused. When Doe was asked why he did not investigate or pursue claims against the Diocese earlier, Doe stated, “there’s really no way

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to tell why my brain worked that way.” Moreover, the record indicates that Doe knew many years before his lawsuit that the Diocese’s alleged representations to him may have been false. For example, in 2006, Doe posted on an internet forum that he had been “molested” by a priest and wanted to “seek retribution from the catholic church.” This undercuts Doe’s claim that he had no reason to suspect the Diocese of wrongdoing until 2010 when he learned there were other victims of the same priest.

In sum, because Doe was on inquiry notice nearly three decades before filing suit, but did not take any reasonable steps to investigate his claims, the trial court correctly held that the statute of limitations barred Doe’s claims as a matter of law.

Doe also argues that equitable estoppel prevents the Diocese from relying on the statute of limitations because the Diocese “engaged in extensive acts of concealment and misrepresentations of material facts . . . so that victims . . . would not bring civil suits against” it. We reject this argument because, as explained above, there is no evidence in the record that the Diocese concealed anything from Doe, or misrepresented anything to him, after his alleged abuse.

“In order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant.” *A.H. Beck Found. Co., Inc. v. Jones Bros., Inc.*, 166 N.C. App. 672, 683, 603 S.E.2d 819, 826 (2004) (internal quotation marks omitted). But in Doe’s deposition testimony, he stated that the Diocese did *not* misrepresent anything to him or conceal anything from him that caused him to delay in filing a lawsuit. Indeed, as explained above, Doe testified that he “didn’t interact with the Diocese whatsoever” after he was abused, and thus the Diocese had “no opportunity” to make misrepresentations to him in order to conceal their alleged wrongdoing. In light of Doe’s own testimony, and the lack of any other record evidence of after-the-fact concealment or misrepresentations by the Diocese directed at Doe, the trial court did not err in rejecting this argument as a matter of law.

II. Evidentiary Rulings

Doe also argues that the trial court erred in granting the Diocese’s motion to limit the testimony of Doe’s expert witness and its motion *in limine* excluding other related evidence. We need not address these issues because the testimony and evidence Doe sought to admit does not relate to the issue of whether Doe exercised reasonable diligence in investigating his claims against the Diocese. As a result, the admission or exclusion of that evidence would not affect our holding that the trial

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court properly entered summary judgment based on expiration of the statute of limitations. Accordingly, any error in these evidentiary rulings is harmless. *See* N.C. R. Civ. P. 61 (2014).

Conclusion

For the reasons discussed above, we hold that Doe's claims against the Roman Catholic Diocese of Charlotte are barred by the applicable statutes of limitations. Accordingly, we affirm the trial court's entry of summary judgment.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

PATRICIA L. HEAD, PLAINTIFF

v.

ADAMS FARM LIVING, INC., DEFENDANT

No. COA14-1353

Filed 18 August 2015

1. Employer and Employee—religious accommodation—flu shot

Defendant employer did not have a legal duty to reasonably accommodate plaintiff's religious beliefs where plaintiff worked in a skilled nursing and healthcare facility which suffered a flu outbreak and required staff to have a flu shot. Although plaintiff asserted that the duty of reasonable accommodation under Title VII of the Civil Rights Act of 1964 should be read into N.C.G.S. § 143-422.2, the North Carolina statute did not impose a corresponding duty of reasonable accommodation by an employer.

2. Employer and Employee—flu shot—disparate treatment

Applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, there was no disparate treatment where plaintiff worked in a skilled nursing and healthcare facility which suffered a flu outbreak, all staff were required to have a flu shot, plaintiff refused and was terminated, and others who refused were not terminated.

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Appeal by plaintiff from order entered 5 September 2014 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 7 April 2015.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and J. Allen Thomas, and Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendant-appellee.

DAVIS, Judge.

Patricia L. Head (“Plaintiff”) appeals from the trial court’s order granting summary judgment in favor of Adams Farm Living, Inc. (“Defendant”) on her claim that she was wrongfully discharged in violation of North Carolina public policy due to her religious beliefs. After careful review, we affirm.

Factual Background

Defendant operates a skilled nursing and healthcare facility (“the Facility”) in Jamestown, North Carolina. Plaintiff served as the Activities Director for the Facility from 13 November 2006 until her discharge on 10 December 2012. In performing her role as Activities Director, Plaintiff regularly came into contact — and interacted — with residents of the Facility, the majority of whom were elderly.

Plaintiff is a Seventh-Day Adventist. As a member of this religious denomination, she adheres to many of the Levitical dietary laws and consequently cannot “receiv[e] any organic material derived from pigs” into her body. However, she can consume eggs.

In November 2012, the Facility experienced a flu outbreak. In response to the outbreak, the Guilford County Health Department recommended to Patti Anderson (“Anderson”), the Facility’s Administrator, and Dr. Michael Robson (“Dr. Robson”), its Medical Director, that the Facility’s employees and contractors receive the flu vaccine. On 2 December 2012, Anderson posted a notice mandating that all of the Facility’s employees receive a flu shot. The notice stated, in pertinent part, as follows:

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All Staff

INFLUENZA VACCINATION

The vaccine is for your protection, the protection of your family and community AND the protection of our resident family. The flu has already resulted in two deaths in Forsyth County. Let's all work together to protect our community.

MANDATORY VACCINATION

- All Adams Farm staff and contractors are required to have the flu vaccine no later than 11:59 p.m. Wednesday, December 5, 2012.
- Declining is not an option. This is a dead virus and the only standard reason for not receiving [sic] is an allergy to eggs.
- THEREFORE, to not receive the vaccine would require a physician statement dated between today and Wednesday December 5, 2012, stating the *specific* medical justification.
- Failure to receive the vaccination or provide the required documentation will result in being taken off the work schedule.

On 3 December 2012, Plaintiff obtained a letter from Dr. W. P. Hollar ("Dr. Hollar"), a chiropractor (who is also Plaintiff's father), asking that she be exempted from the vaccine requirement. The letter stated, in pertinent part, as follows:

To Whom it May Concern:

I am respectfully submitting this document to help you understand why [Plaintiff] is respectfully declining to take the flu shot at your skilled nursing facility. She has told me that you have made it mandatory to all your employees. That is why she has ask [sic] for my guidance in this matter.

It is my opinion that, because in [Plaintiff's] childhood she suffered from a [sic] autoimmune disease that debilitated her, so much that she was taken out of school for several months and has had several exacerbations in her adult life

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as well. I don't want her to take the risk and [sic] her fear of compromising her immune system. [Plaintiff] will be willing to wear a face mask if necessary I am sure. If I may be of any further help in this matter, please let me know.

Thank you in advance for your understanding in this matter and your inconvenience.

Plaintiff submitted Dr. Hollar's letter to Anderson during a meeting between the two of them on or about 4 December 2012 in which Plaintiff explained that she "did not want to take the vaccine, and if it had swine stuff in it, no, I did not [want to take the vaccine], because of my religion." During the meeting, Plaintiff also provided Anderson with an Internet article titled "Pastor: Vaccines Are Not Kosher." The article stated, in part, that "[i]f you stay clear of pork and shellfish, as the Bible instructs, you need to know flu vaccines include: animal tissues and fluids forbidden in the Bible . . . Vaccines include horse blood, rabbit brain, dog kidney, monkey kidney, pig blood, and porcine (pig) protein/tissue among other things. . . ." In response, Anderson "pointed out [to Plaintiff] that the flu shot we were asking her to take was egg based and that the vaccine was not for the swine flu. [Plaintiff] agreed she was not allergic to eggs and admitted she ate eggs."

Anderson informed Plaintiff that she would consider Plaintiff's request to be exempted from the vaccine policy along with the letter and article Plaintiff had provided. Anderson then consulted with Dr. Robson regarding Plaintiff's request. Dr. Robson told Anderson that Plaintiff's childhood illness "actually made it even more important for her own health that she receive a flu shot." Dr. Robson also offered to meet with Plaintiff, telling Anderson that Plaintiff could "[c]ome and talk to me anytime" about her concerns with taking the flu shot.

On 6 December 2012, Anderson had another meeting with Plaintiff. At this meeting, Plaintiff was informed that Anderson could not accept Dr. Hollar's letter as she did not consider it to be a "physician statement" as required by the vaccine notice. Anderson further informed Plaintiff that based on her own research she had learned that the Seventh-Day Adventist Church – doctrinally – takes no position on the propriety of receiving flu shots.

Plaintiff reiterated her refusal to take the flu shot, stating — among other things — that "[she] didn't want to take the flu shot based upon [her] views of [her] own health" and that her "dietary concerns . . . w[ere] personal to [her]." Anderson informed Plaintiff of Dr. Robson's

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offer to meet with her, but Plaintiff declined the offer. Anderson also told Plaintiff she could have additional time to obtain a letter from a physician providing a medical justification for her refusal to be vaccinated.

On 7 December 2012, Anderson called Plaintiff at her home “in another and final attempt to assure that [Plaintiff] had sufficient opportunity to consider her decision and seek medical doctor input[.]” Anderson then “reviewed for a final time [Plaintiff’s] position as [she] understood it.”

Four days later, Plaintiff called and spoke with Anderson again. Plaintiff informed Anderson that she would not agree to take the flu shot. Anderson then terminated her employment with Defendant.

Three other employees of Defendant provided medical notes stating that they could not take the flu shot because they were either allergic to eggs or had experienced an adverse reaction to a flu vaccination in the past. Based on these notes, these employees were excused from the vaccine requirement. One other employee resigned rather than be vaccinated.

On 28 January 2013 — over a month after her discharge — Plaintiff obtained a letter from Dr. Stephen Leighton (“Dr. Leighton”), a licensed physician, stating that he had advised Plaintiff not to take the flu shot because receiving the vaccination could result in a recurrence of the autoimmune disease she experienced as a child. Plaintiff did not provide this letter to Anderson. Nor did she make any request that Defendant reinstate her to her former job.

On 30 October 2013, Plaintiff filed a complaint in Guilford County Superior Court asserting claims against Defendant for wrongful discharge in violation of North Carolina public policy. In her complaint, she alleged that her discharge violated North Carolina’s public policies against religious discrimination and interference with the physician-patient relationship. On 30 December 2013, Defendant filed an answer to the complaint.

On 16 July 2014, Defendant filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. In support of its motion, Defendant submitted an affidavit from Anderson, the depositions of Plaintiff and Dr. Robson, and a number of exhibits. Defendant filed an amended motion for summary judgment on 15 August 2014 for the purpose of supplementing the record with an additional affidavit from Anderson. In response to Defendant’s motion, Plaintiff submitted her own affidavit.

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A hearing on Defendant's amended motion for summary judgment was held before the Honorable R. Stuart Albright on 2 September 2014. On 5 September 2014, Judge Albright entered an order granting summary judgment in favor of Defendant. Plaintiff filed a timely notice of appeal to this Court.

Analysis

Plaintiff's sole argument on appeal is that the trial court erred in granting Defendant's motion for summary judgment. She contends that because (1) Defendant failed to provide a reasonable accommodation for her religious beliefs; and (2) she produced sufficient evidence to create a jury question under a disparate treatment theory as to whether her discharge resulted from religious discrimination, the trial court's order should be vacated and the case remanded for trial.¹

"On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, __ N.C. App. __, __, 755 S.E.2d 56, 59 (2014) (internal citations and quotation marks omitted). "The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, __ N.C. App. __, __, 769 S.E.2d 214, 216 (2015) (citation omitted).

I. Wrongful Discharge in Violation of Public Policy

It is well settled that "[i]n North Carolina, absent an employment contract for a definite period of time, both employer and employee are

1. Plaintiff does not challenge the trial court's entry of summary judgment as to her claim that her discharge violated North Carolina's public policy against interfering with the physician-patient relationship. Therefore, that issue is not before us in this appeal. *See* N.C.R. App. P. 28(b)(6); *Wilkerson v. Duke Univ.*, __ N.C. App. __, __, 748 S.E.2d 154, 161 (2013) ("Plaintiff makes no argument on appeal that the trial court erred in granting summary judgment in favor of defendants with regards to his claims of public stigmatization and negligence. These arguments are deemed abandoned.").

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generally free to terminate their association at any time and without reason. An exception to the employment-at-will doctrine exists when an employee is discharged in contravention of public policy.” *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 321-22, 528 S.E.2d 368, 370 (2000) (internal citations and quotation marks omitted).

In order to state such a claim, “an employee must plead and prove that the employee’s dismissal occurred for a reason that violates public policy.” *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 259, 580 S.E.2d 757, 761-62 (2003) (citation, quotation marks, and alterations omitted). Furthermore, “[t]he public policy exception to the at-will employment doctrine is confined to the express statements contained within our General Statutes or our Constitution.” *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222, 618 S.E.2d 750, 753 (2005).

In her appeal, Plaintiff asserts that her discharge violated North Carolina’s public policy against religious discrimination as articulated by our General Assembly in N.C. Gen. Stat. § 143-422.2, which states, in pertinent part, that

[i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen. Stat. § 143-422.2 (2013).

A. Duty to Accommodate

[1] Plaintiff contends that Defendant had a legal duty to reasonably accommodate her religious beliefs and failed to do so. In making this argument, Plaintiff asserts that because a duty of reasonable accommodation exists under Title VII of the Civil Rights Act of 1964, such a requirement should likewise be read into N.C. Gen. Stat. § 143-422.2.

Plaintiff is correct that employers generally have a duty — subject to certain exceptions — to reasonably accommodate the religious beliefs of their employees under Title VII. 42 U.S.C. § 2000e-2 provides, in pertinent part, that “[i]t shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion[.]” 42 U.S.C. § 2000e-2(a)(1) (2013). This statutory provision operates in conjunction with 42 U.S.C. § 2000e(j), which states, in part,

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that “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee’s . . . religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j) (2013).

However, we have previously held that N.C. Gen. Stat. § 143-422.2 does *not* impose a corresponding duty of reasonable accommodation by an employer. In *Simmons*, the plaintiff-employee, a welder, brought a wrongful discharge claim against his former employer alleging that he was terminated in violation of North Carolina public policy as articulated in N.C. Gen. Stat. § 143-422.2 due to a respiratory condition that rendered him disabled and unable to perform his job duties. *Simmons*, 137 N.C. App. at 319-20, 528 S.E.2d at 369. The defendant moved for summary judgment, asserting that the plaintiff was discharged not because of his medical condition but rather because of his poor job performance. *Id.* at 320-21, 528 S.E.2d at 369. The plaintiff contended that any deficiencies in his job performance were the result of the defendant’s failure to make reasonable accommodations for his respiratory condition by, for example, providing him with breathing masks, ceiling fans, and other breathing aids that would have allowed him to perform his job duties despite his disability. *Id.* at 320, 528 S.E.2d at 369. He argued that the defendant’s failure to reasonably accommodate his disability violated N.C. Gen. Stat. § 143-422.2. *Id.*

On appeal, we affirmed the trial court’s entry of summary judgment in favor of the defendant. In rejecting the plaintiff’s reasonable accommodation argument, we held that

plaintiff’s concern with the defendant’s alleged failure to provide reasonable accommodations to the plaintiff is misplaced. Had plaintiff filed a claim under N.C. Gen. Stat. § 168A-11, which provides a civil cause of action under the NCHPPA, such a discussion may have been appropriate. However, since plaintiff’s claim is based on wrongful discharge in violation of public policy under N.C. Gen. Stat. § 143-422.2, a discussion of reasonable accommodations . . . is irrelevant.

Id. at 323, 528 S.E.2d at 371.

Therefore, *Simmons* establishes that no duty of reasonable accommodation exists under N.C. Gen. Stat. § 143-422.2. While *Simmons* concerned a claim of discrimination based on disability rather than religion, this distinction is irrelevant given that the articulation of public policy

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set out in N.C. Gen. Stat. § 143-422.2 prohibits discrimination in employment based on both disability and religion. Plaintiff's argument on this issue is therefore overruled.

B. Disparate Treatment

[2] Plaintiff next argues that even if no duty of reasonable accommodation existed, the trial court nevertheless erred in granting Defendant's motion for summary judgment based on a disparate treatment theory. In analyzing Plaintiff's allegations of disparate treatment, we apply the analytical framework articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668 (1973).

The Supreme Court of the United States in *McDonnell Douglas* established evidentiary standards to be applied governing the disposition of an action challenging employment discrimination. First, the claimant carries the initial burden of establishing a prima facie case of discrimination. The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. If a legitimate, nondiscriminatory reason has been articulated, the claimant has the opportunity to show that the employer's stated reason for the claimant's rejection was in fact pretext.

The North Carolina Supreme Court has explicitly adopted the Title VII evidentiary standards in evaluating a state claim under § 143-422.2 insofar as they do not conflict with North Carolina statutes and case law.

Johnson v. Crossroads Ford, Inc., __ N.C. App. __, __, 749 S.E.2d 102, 107-08, *disc. review denied*, 367 N.C. 283, 752 S.E.2d 471 (2013) (internal citations, quotation marks, and brackets omitted).

In applying this test, "the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee." *Id.* at __, 749 S.E.2d at 108 (citation, quotation marks, and brackets omitted). Therefore, we must apply the *McDonnell Douglas* test in reviewing the trial court's entry of summary judgment for Defendant.

1. Prima Facie Case

Our Supreme Court has observed that "[t]he burden of establishing a prima facie case of discrimination is not onerous. It may be established

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in various ways.” *N.C. Dep’t of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 82 (1983) (internal citation omitted).

In *Johnson*, we held that “[i]n order to establish a prima facie case of disparate treatment pursuant to N.C.G.S. § 143-422.2, plaintiff must show by a preponderance of the evidence that: (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances.” *Johnson*, __ N.C. App. at __, 749 S.E.2d at 108 (citation and brackets omitted).

When a prima facie case is established, a presumption arises that the employer unlawfully discriminated against the employee. The showing of a prima facie case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer’s actions were based upon discriminatory considerations.

Gibson, 308 N.C. at 138, 301 S.E.2d at 83 (internal citations omitted).

As a Seventh-Day Adventist, Plaintiff was a member of a protected class. *See Vanderburg v. N.C. Dep’t of Revenue*, 168 N.C. App. 598, 609-11, 608 S.E.2d 831, 839-40 (2005) (recognizing religious affiliation as constituting membership in protected class in employment discrimination context). Furthermore, she contends — and Defendant does not dispute — that she was qualified for her position and was satisfactorily performing her job duties. Finally, she was terminated for her refusal to take the flu vaccine while three other employees who were not Seventh-Day Adventists were allowed to keep their jobs despite not taking the vaccine.

Therefore, Plaintiff has made out a *prima facie* case of religious discrimination. *See Vanderburg*, 168 N.C. App. at 610-11, 608 S.E.2d at 840 (where plaintiff “offered substantial evidence showing his dismissal was not based on his alleged unacceptable job performance” and that termination was allegedly based, in part, on his religious expression and practices, “evidence was sufficient to show a *prima facie* case of discrimination . . . based on his religious practices”).

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2. Legitimate Nondiscriminatory Reason

It is well settled that

[o]nce a prima facie case of discrimination is established, the employer has the burden of producing evidence to rebut the presumption of discrimination raised by the prima facie case. . . . The employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination.

Gibson, 308 N.C. at 138, 301 S.E.2d at 83 (emphasis omitted).

“To rebut the presumption of discrimination, the employer must clearly explain by admissible evidence, the nondiscriminatory reasons for the employee’s rejection or discharge. The explanation must be legally sufficient to support a judgment for the employer. If the employer is able to meet this requirement, the prima facie case, and the attendant presumption giving rise thereto, is successfully rebutted.” *Id.* at 139, 301 S.E.2d at 84 (internal citations omitted).

In the present case, Defendant has clearly established a nondiscriminatory reason for Plaintiff’s discharge. In her affidavit, Anderson discussed the circumstances giving rise to the Facility’s requirement that its employees receive the flu vaccination.

4. In late November 2012, we had a flu “outbreak” at our facility as defined by the Center for Disease Control (“CDC”). Our residents are highly vulnerable to respiratory illnesses due to their age and/or multiple and complex comorbidities. These comorbidities, when combined with acute respiratory illness, can cause our residents to suffer serious medical complications and can even lead to death.

5. To protect residents from the serious health dangers associated with a flu outbreak, the CDC, through its published bulletins, and the Guilford County Health Department, through its direct communications with both me and our Medical Director, strongly recommended that a flu shot be required for employees and contractors working at healthcare facilities who come in contact with residents.

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22. As a result of the flu outbreak in November-December 2012, 31 residents (36% of all residents) were diagnosed with upper respiratory infection (probable flu), 4 residents were hospitalized, and, based on the Medical Director's review, 3 residents died for reasons related to the outbreak. It was only after it was determined that our facility had a verified influenza outbreak per CDC guidelines that the decision to require employee vaccination was made and the mandatory vaccination policy was implemented.

Anderson's affidavit further related the entire sequence of events leading up to Plaintiff's discharge, including Anderson's efforts to resolve the issues raised by Plaintiff's refusal to take the vaccine. Anderson testified that after her initial meeting with Plaintiff, she "consulted with [her] supervisor, Debbie Combs-Jones. [Combs-Jones] and [Anderson] agreed that [Plaintiff] needed to provide . . . a note from a medical doctor in order to be excused from taking a flu shot. This standard applied to all employees who asked to be excused from taking a flu shot."

Anderson's affidavit also stated the following:

At approximately 3 p.m. on Friday December 7, 2012, in another and final attempt to assure that [Plaintiff] had sufficient opportunity to consider her decision and seek medical doctor input, I called [Plaintiff] at her home and reviewed for a final time [Plaintiff's] position as I understood it. Ms. Connie Ostler, our facility human resources professional, was present for this discussion. The following points were reviewed: 1) [Plaintiff] had no justification that allowed her an exception; 2) [Plaintiff] did not have an allergy to eggs; 3) [Plaintiff] had been encouraged to seek advice from a medical doctor; 4) [Dr. Robson] was willing to answer any questions [Plaintiff] had about the actual vaccine; 5) [Plaintiff] acknowledged that she did not state a medical justification that made her eligible for an exception by the CDC; 6) [Plaintiff] had the justification for the requirement of the vaccination explained to her, including the fact that [Plaintiff's] position as Activities Director required that she have ongoing contact with the residents of [the Facility]; 7) [Plaintiff] had been offered an opportunity to think about her decision before committing to a final decision. [Plaintiff] agreed to the above points of discussion. [Plaintiff] further stated that she did not wish to speak to [Dr. Robson] because he had "already made up his mind."

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Anderson's unambiguous testimony established that Plaintiff was discharged because "she refused to take a flu shot without providing a medical excuse from a medical doctor . . . [H]er religion played no role in [the] decision." Accordingly, Defendant has met its burden of articulating a nondiscriminatory reason for her discharge. *See Johnson*, __ N.C. App. at __, 749 S.E.2d at 109 ("Defendant rebutted plaintiff's [*prima facie*] case [for wrongful discharge in violation of North Carolina public policy] by producing evidence of a legitimate, nondiscriminatory reason for plaintiff's dismissal[.]").

3. Pretext

Because Defendant met its burden of setting forth a legitimate non-discriminatory reason for discharging Plaintiff, the burden shifts back to Plaintiff to show that Defendant's asserted ground is merely a pretext for discrimination. *See Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 791, 618 S.E.2d 201, 207 (2005) ("If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual."). "To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's [nondiscriminatory] motive." *Manickavasagar v. N.C. Dept. of Pub. Safety*, __ N.C. App. __, __, 767 S.E.2d 652, 659 (2014) (citation and quotation marks omitted).

Plaintiff makes several arguments in an attempt to show that Defendant's asserted nondiscriminatory reason for her discharge was pretextual. Based on our thorough review of the entire record, we conclude that she has failed to meet her burden on this issue. We address each of her arguments in turn.

First, she contends that by refusing to accept Dr. Hollar's letter, Defendant treated her differently than the three employees who were excused from the vaccine requirement based on their submission of letters from medical providers. The flaw with her argument is that the 2 December 2012 notice explaining the mandatory vaccination policy to Defendant's employees required a "physician statement" containing a "specific medical justification" in order to be exempt from the vaccine requirement. We believe that Defendant could have reasonably determined that Dr. Hollar's letter did not comply with these requirements.

It is undisputed that Dr. Hollar was a chiropractor. Our General Assembly has made clear that

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[a]ny person obtaining a license from the Board of Chiropractic Examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, *but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery.*

N.C. Gen. Stat. § 90-151 (2013) (emphasis added). “Chiropractic” is statutorily defined as “the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body.” N.C. Gen. Stat. § 90-143(a) (2013). North Carolina law recognizes the existence of limitations on a chiropractor’s expertise in health matters. *See* N.C. Gen. Stat. § 90-157.2 (placing limits on medical issues as to which chiropractors can provide expert testimony in a court of law). Notably, for purposes of the present case, N.C. Gen. Stat. § 90-151 expressly mandates that a chiropractor “shall not prescribe for or administer to any person any medicine or drugs[.]” N.C. Gen. Stat. § 90-151.

Plaintiff argues that Defendant’s refusal to accept the letter from Dr. Hollar, a chiropractor, cannot be reconciled with the fact that it accepted a note from a physician assistant offered by one of the three employees who was granted an exception from the vaccine requirement. However, pursuant to N.C. Gen. Stat. § 90-18.1, physician assistants are authorized — subject to certain conditions — to “write prescriptions for drugs,” “compound and dispense drugs,” and “order medications, tests and treatments in hospitals, clinics, nursing homes, and other health facilities.” N.C. Gen. Stat. § 90-18.1(b)-(d) (2013).

We recognize that chiropractors provide valuable services to their patients for the types of physical conditions encompassed by N.C. Gen. Stat. § 90-143. We are also cognizant of the fact that physician assistants provide medical care only under the supervision of a licensed physician. However, as shown above, physician assistants are authorized to perform a number of services in the course of providing medical care to patients that chiropractors lack the power to provide.

Given that the issue here concerned the existence of a medical justification for refusing a flu vaccine, we cannot say that it was illogical under these circumstances for Defendant to accept a note from a physician assistant while refusing to accept the letter from Dr. Hollar. Thus, we believe that Defendant’s actions in this regard were neither

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objectively unreasonable nor suggestive of an impermissible motive to discriminate against Plaintiff's religious beliefs.

Furthermore, key differences existed between the medical justification cited in Dr. Hollar's letter as compared with those contained in the notes submitted by the three employees who sought — and received — exemptions from the vaccination requirement. According to the notes submitted on behalf of those employees, one had experienced a past adverse reaction to the flu vaccine and the remaining two were allergic to eggs.

Conversely, the letter from Dr. Hollar merely stated that Plaintiff had previously suffered from an autoimmune disease. While Dr. Hollar made a vague reference to a fear of "compromising her immune system," the letter neither (1) identified an actual link between the autoimmune disease she had experienced and the flu vaccine; nor (2) explained — even in general terms — how the flu vaccine had the potential to adversely affect her immune system. For this reason, Dr. Hollar's letter did not satisfy the requirement contained in the 2 December 2012 notice that a physician statement requesting an exemption for an employee state the "*specific* medical justification" for refusing the vaccination.

We further note that Anderson encouraged Plaintiff to take additional time to think over her decision, offered her the opportunity to speak with Dr. Robson, and gave her the chance to submit a new letter from a physician. These acts by Anderson are inconsistent with the notion that Defendant used Plaintiff's refusal to take a flu shot as an excuse to terminate her on account of her religious beliefs.

As a second basis for attempting to establish pretext, Plaintiff asserts that the employees of Defendant's sister facility — Heartland Living & Rehabilitation ("Heartland") in Greensboro, North Carolina — were not required to take the flu vaccination, and, therefore, were not subject to discharge for refusing to do so. However, Anderson testified that Heartland "did not require its employees to receive a flu vaccine because it did not have a flu outbreak as defined by the CDC guidelines." Conversely, as a result of the flu outbreak at the Facility, three residents died, four were hospitalized, and 31 were diagnosed with upper respiratory infections.

For these reasons, it was logical for the Facility to impose a mandatory flu vaccination policy for its employees despite the absence of a comparable policy at Heartland, and Plaintiff cannot show that she was similarly situated to the employees at Heartland for purposes of establishing pretext. See *Wang v. UNC-CH Sch. of Med.*, 216 N.C. App. 185, 204, 716 S.E.2d 646, 658 (2011) ("A Plaintiff relying on disparate treatment evidence must show that she was similarly situated in all material

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respects to the individuals with whom she seeks to compare herself[.]” (citation, quotation marks, and alteration omitted)).

Finally, Plaintiff argues that the letter she obtained on 28 January 2013 from Dr. Leighton, a physician, established a medical justification for her refusal to take the flu shot. However, she obtained this letter over a month after her discharge and never provided the letter to Anderson. Nor did Plaintiff ever request that she be reinstated following her termination. Therefore, the existence of Dr. Leighton’s letter lacks any relevance to Defendant’s justification for terminating her employment over one month earlier.

We are satisfied that none of Plaintiff’s arguments — either singularly or in combination — are sufficient to raise a genuine issue of material fact as to whether Defendant’s asserted rationale for her discharge was a pretext for religious discrimination. *See Fatta v. M & M Props. Mgmt., Inc.*, 221 N.C. App. 369, 375-76, 727 S.E.2d 595, 601 (2012) (“Viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact with respect to the pretext issue. Accordingly, we affirm the trial court’s order granting summary judgment in favor of defendant.” (internal citation omitted)), *disc. review denied*, 366 N.C. 601, 743 S.E.2d 182, 182-83 (2013). As this Court has recognized,

a plaintiff’s own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action. It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff. Even in discrimination cases where motive and intent are critical to the analysis, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation.

Id. at 375, 727 S.E.2d at 601 (internal citations and quotation marks omitted). We conclude that this is such a case.

Conclusion

For the reasons stated above, we affirm the trial court’s order granting summary judgment in favor of Defendant.

AFFIRMED.

Judges BRYANT and INMAN concur.

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[242 N.C. App. 562 (2015)]

TIMOTHY W. HOLLIDAY, EMPLOYEE, PLAINTIFF

v.

TROPICAL NUT & FRUIT CO., EMPLOYER, FARMINGTON CASUALTY CO.,
CARRIER, DEFENDANTS

No. COA14-1030

Filed 18 August 2015

**1. Workers' Compensation—company conference—laser tag—
all expenses paid by company**

In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, there was copious competent evidence supporting the Industrial Commission's finding that the company controlled and paid for all components of the conference.

**2. Workers' Compensation—company conference—laser tag—
business event**

In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, there was evidence supporting the Industrial Commission's characterization that the laser tag was more of a business event that was calculated to further, directly or indirectly, the employer's business than a social or employee appreciation event.

**3. Workers' Compensation—injury arising from employment—
laser tag**

In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, the Industrial Commission did not err in finding that plaintiff's injury arose out of his employment. None of the N.C. cases cited involved a situation where the employee's attendance was expressly mandated at the event in question or where the employer received a benefit from the event beyond an intangible improvement to employee morale. The nexus between the injury and the employment in the present case was substantially greater than that in the cases relied upon by defendants.

4. Workers' Compensation—injury by accident—company conference—laser tag—specific evidence of injury

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's knee injury constituted an

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injury by accident. Plaintiff's testimony that he felt a "sharp pain" in his leg approximately 15 minutes into the activity and that he "could tell something was wrong" once he attempted to move from his position was sufficiently specific to demonstrate that the injury he suffered was neither a mere gradual build-up of pain nor a result of "multiple events occurring over a period of time. Moreover, defendants did not cite any case law requiring greater specificity under analogous circumstances so as to mandate a contrary result.

5. Workers' Compensation—disability—total knee replacement—work restrictions

Defendants contend that the Industrial Commission's determination that "Plaintiff was and remained disabled as of 24 May 2013, the date he underwent total knee replacement surgery" was not supported by sufficient evidence because there was no evidence presented regarding plaintiff's work restrictions following his knee replacement surgery. Contrary to defendants' assertions, the absence of evidence as to the type of limited or restricted work plaintiff could perform did not bar his disability claim because Dr. Barnett's testimony supported the conclusion that plaintiff was incapable of performing *any* work after his knee replacement.

Appeal by defendants from opinion and award entered 10 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 February 2015.

Ganly & Ramer, by Thomas F. Ramer, for plaintiff-appellee.

Northup McConnell & Sizemore, PLLC, by Charles E. McGee, for defendants-appellants.

DAVIS, Judge.

Tropical Nut & Fruit Co. ("Tropical") and Farmington Casualty Co. (collectively "Defendants") appeal from the Opinion and Award of the North Carolina Industrial Commission ("the Commission") awarding Timothy W. Holliday ("Plaintiff") workers' compensation benefits. On appeal, Defendants argue that the Commission erred in (1) concluding that Plaintiff's injury arose out of his employment; (2) determining that Plaintiff sustained a compensable injury by accident; and (3) awarding Plaintiff temporary total disability benefits. After careful review, we affirm the Commission's Opinion and Award.

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Factual Background

Plaintiff is a 54-year-old man who, at the time of his injury, had been employed by Tropical as a territory manager and outside sales representative in Asheville, North Carolina for approximately one and a half years. From 18 August to 20 August 2011, Plaintiff attended Tropical's annual three-day National Sales and Marketing Conference ("the Conference") in Charlotte, North Carolina. At the Conference, Tropical discussed the past year's sales, introduced new products, held training sessions, discussed prospective strategies for the company, presented end-of-year awards, and provided an opportunity for the employees to meet vendors as well as colleagues who worked for Tropical in various other locations.

Attendance at the Conference was mandatory for Plaintiff. He was paid his normal salary during the three days the Conference was held, and he was not permitted to bring his spouse or children to the Conference.

On 18 August 2011, the first evening of the Conference, Tropical organized a social event at Sports Connection in Charlotte for the members of its sales staff who were attending the Conference. The activities consisted of bowling and laser tag. Tropical paid all of the expenses for the activities, assigned the employees to teams, and informed the employees which activity they would be assigned to participate in — laser tag or bowling — upon their arrival at the event.

Plaintiff's first assigned activity was laser tag. During the game, Plaintiff was "covering the floor [of the laser tag arena], and going up and down ramps, and twisting and bending around columns, trying to catch people . . . with the laser." Approximately 15 minutes into the game, Plaintiff "started feeling some sharp pain" in his leg, which became severe when he attempted to continue the game. As a result, Plaintiff remained in one location and "[took] it a little easier . . . until the thirty minutes was up."

At that point, Plaintiff was "in quite a bit of pain" and "had a very noticeable limp." He sat down to remove his laser tag gear and informed his general manager that he believed he had hurt his right knee. Plaintiff applied ice to his knee and was able to attend the remainder of the Conference.

He continued to perform his job duties once he returned from the Conference to Asheville, but his right knee pain persisted and he scheduled an appointment with Dr. Thomas Baumgarten ("Dr. Baumgarten"),

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an orthopedist, for 30 August 2011. During this appointment, Dr. Baumgarten observed that Plaintiff had fluid in his right knee joint, tenderness along the medial joint line, and “a positive McMurray’s test which is usually indicative of some type of torn meniscus or torn cartilage.” An MRI scan revealed tears to the medial meniscus and the lateral meniscus.

On 3 October 2011, Plaintiff underwent arthroscopic right knee surgery to repair the meniscal tears. Plaintiff did not miss work due to his right knee pain or surgery and was able to continue performing his job duties until he was laid off on 13 July 2012 due to a company-wide restructuring.

On 25 October 2012, Plaintiff saw Dr. Jesse West (“Dr. West”), an orthopedic specialist, for a second opinion concerning his right knee following the arthroscopic surgery. Dr. West noted chondromalacia, or cartilage damage, to Plaintiff’s right knee and referred him to Dr. T. Marcus Barnett (“Dr. Barnett”) based on his determination that Plaintiff required a total knee replacement. Dr. West also completed a “work status report,” which stated that Plaintiff could return to work with modified duties, meaning that he was restricted from “prolonged standing or walking,” lifting over ten pounds, and squatting, kneeling, or twisting. Dr. West further noted on this document that if modified duties were not available, Plaintiff should be considered “off work.”

During this time, Plaintiff experienced low back pain, which radiated down his right buttock, hip, and thigh. Plaintiff underwent back surgery on 9 January 2013 to repair a disc herniation at S1-2 with moderate stenosis at L3-4 and L4-5. After Plaintiff recovered from his back surgery¹, Dr. Barnett performed a total knee replacement of his right knee on 24 May 2013. Plaintiff had not yet had his first post-operative visit at the time of Dr. Barnett’s deposition on 11 June 2013, but in his deposition testimony Dr. Barnett anticipated that Plaintiff would have a three- to six-month recovery period following the total knee replacement.

Plaintiff filed a Form 18 seeking workers’ compensation benefits in connection with his 18 August 2011 injury, and Defendants filed a Form 61 denying Plaintiff’s claim. Plaintiff requested that his claim be assigned for hearing, and on 28 August 2012, the claim was heard by Deputy Commissioner George R. Hall, III. Deputy Commissioner Hall

1. The Commission concluded that Plaintiff “failed to prove that his low back complaints were caused or aggravated by the injury he sustained to his right knee on August 18, 2011,” and Plaintiff has not challenged this determination on appeal.

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filed an opinion and award on 26 August 2013 concluding that “Plaintiff sustained a compensable right knee injury on August 18, 2011, which required surgical correction and ultimate knee replacement which were both necessitated by the aggravation caused by his laser tag injury” and that Plaintiff was temporarily totally disabled. Consequently, Deputy Commissioner Hall awarded Plaintiff temporary total disability benefits and ordered Defendants to provide any medical treatment reasonably required to effect a cure and provide relief for his right knee injury. Defendants appealed to the Full Commission, and the Commission affirmed the deputy commissioner’s decision in an Opinion and Award entered 10 June 2014. Defendants filed a timely notice of appeal to this Court.

Analysis

Our review of an opinion and award of the Industrial Commission is “limited to consideration of whether competent evidence supports the Commission’s findings of fact and whether the findings support the Commission’s conclusions of law.” *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). When reviewing the Commission’s findings of fact, this Court’s “duty goes no further than to determine whether the record contains any evidence tending to support the finding[s].” *Id.* (citation and quotation marks omitted).

The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009). The Commission’s conclusions of law, however, are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74, *disc. review denied*, ___ N.C. ___, 719 S.E.2d 26 (2011). Evidence supporting the plaintiff’s claim is to be viewed in the light most favorable to the plaintiff, and the plaintiff is entitled to the benefit of any reasonable inferences that may be drawn from the evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Under the Workers’ Compensation Act (“the Act”), an injury is compensable if the claimant proves three elements: “(1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment.” *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). In the present case, Defendants contend that Plaintiff’s injury is not compensable because

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(1) the injury did not arise out of his employment; and (2) the injury was not caused by an accident for purposes of the Act. Defendants further contend that the Commission erred in awarding Plaintiff total temporary disability benefits. We address each of these arguments in turn.

I. “Arising Out of” Element

[1] Defendants’ primary contention on appeal is that Plaintiff’s injury is not compensable because it did not arise out of his employment with Tropical. We disagree.

The “arising out of the employment” element of compensability refers to “the origin or cause of the accident,” and in order to satisfy this element, “the employment must be a contributing cause or bear a reasonable relationship to the employee’s injuries.” *Morgan v. Morgan Motor Co. of Albemarle*, ___ N.C. App. ___, ___, 752 S.E.2d 677, 680 (2013) (citations and quotation marks omitted), *aff’d per curiam*, ___ N.C. ___, 772 S.E.2d 238 (2015). Defendants here assert that because participation in the laser tag event was not mandatory, the event was a “fun outing” that did not provide any measurable benefit to Tropical. Defendants consequently challenge the Commission’s findings that reach a contrary result, arguing that the Commission’s resulting determination that Plaintiff’s injury arose from his employment is contrary to established caselaw.

A. Findings of Fact

The Commission made the following pertinent findings of fact in support of its determination that Plaintiff’s injury arose from his employment:

2. On August 18, 2011, Plaintiff attended Defendant-Employer’s National Sales and Marketing Conference in Charlotte, North Carolina, an annual event that included various scheduled activities, including sales meetings, new product meetings, dinners, award ceremonies, pastry training, video production of spoof commercials, a Jeopardy game, bowling, and laser tag. It was mandatory that Plaintiff attend the conference, and he was not permitted to bring his family with him. During the entire time he was at the conference, from Thursday, August 18 through the afternoon of Saturday, August 20, 2011, Plaintiff was considered to be working, and as a salaried employee, he was paid his normal salary.

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3. Defendant-Employer paid for and controlled every aspect of the conference for its 68 participants, including making airline reservations for those employees who were flying in from other parts of the country, making hotel reservations, assigning rooms and roommates, making dinner reservations, choosing and scheduling all events, including laser tag, and assigning the attendees to teams for the various activities. The cost and expenses associated with the conference were written-off by Defendant-Employer as necessary business expenses.

4. Defendant-Employer held its annual conference to recap the year's sales, to introduce new products, to give end of year awards, and to give sales persons an opportunity to meet vendors and network with colleagues who worked in other cities. Training was provided during the structured parts of the conference to talk about products, strategies, and goals. The "fun" parts of the conference were scheduled to thank, recognize and encourage the employees and to give them "all the chances they can to be with the other folks from other operational centers." Attendance at all scheduled functions, including the "fun" activities, was mandatory, and attendance was taken because "the whole idea was to get people together so they would meet new people . . ." Defendant-Employer's President, John Bauer, testified that it "was not meant to be an employee appreciation event — it's more of a business event."

5. For the 2011 annual conference, the "fun" activity that Defendant-Employer scheduled for the attendees was an evening of laser tag and bowling at the Sports Connection in Charlotte. Conference attendees were emailed directions to Sports Connection in advance of the conference, and they were given tickets purchased by Defendant-Employer to buy drinks. All conference attendees were expected to attend the event at the Sports Connection, and attendance was taken to make sure no one skipped the event. Arnold Stone, Defendant-Employer's VP of Marketing and Sales, testified that the laser tag and bowling were considered to be part of the meeting content and that "the overall evening was an essential part of the meeting content." However, while attendance was

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required, participation in the laser tag and bowling activities was not required, and if an attendee did not feel comfortable participating for whatever reason, there would be no adverse consequences in terms of his status with Defendant-Employer. In this regard, Mr. Stone testified that, “we wanted people to participate but there weren’t any requirements — it’s more of a bonding exercise.”

6. On August 18, 2011, during the required business outing, Plaintiff and the other employees attending the conference were assigned to teams to play laser tag. Plaintiff testified that while playing laser tag for approximately 20 minutes, he walked up and down ramps, crouched behind walls and other obstacles, and quickly and repeatedly twisted in an effort to shoot the opposing team and score points for his team. Plaintiff confirmed, and the Full Commission finds, that these activities were not activities he normally performed as a Territory Manager/Outside Sales Representative for Defendant-Employer.

7. Plaintiff testified, and the Full Commission finds, that about half-way through the laser tag event, after he had been running up and down ramps and twisting and bending around columns, Plaintiff began to experience pain in his right knee. By the time the laser tag ended, Plaintiff was in quite a bit of pain, so he told his supervisor that he thought he hurt his knee playing laser tag.

....

22. On August 18, 2011, Plaintiff sustained an injury by accident to his right knee arising out of and in the course of his employment with Defendant-Employer. Playing laser tag constituted an interruption of Plaintiff’s regular work routine and the introduction of unusual conditions likely to result in unexpected consequences.

....

24. Because Defendant-Employer sponsored and paid for the annual conference, which had a substantial business purpose, maintained a known custom of requiring its employees to attend the conference, took a record of attendance at each conference event, including the “fun” events, and financed and scheduled all events at

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the conference, the injury Plaintiff sustained while playing laser tag arose out of his employment with Defendant-Employer. Plaintiff's trip to the conference and his participation in all events scheduled during the conference by Defendant-Employer, was calculated to further, directly or indirectly, Defendant-Employer's business.

Of the above-quoted findings of fact, Defendants challenge findings 3, 4, and 24 on appeal.² With regard to finding of fact 3, Defendants contend that the portion of the finding stating that Tropical "paid for and controlled every aspect of the conference for its 68 participants" is unsupported by competent evidence. Because the record does not "in any way indicate[] employees were required by Tropical to physically participate in the Laser Tag/bowling activities," Defendants assert, there was "no support for the Commission's determination in Finding of Fact 3 that all aspects of the Sales Conference were controlled by Tropical."

The itinerary for the Conference set forth a detailed schedule of meetings, trainings, and activities for the three-day duration of the event. Beginning at 4:00 p.m. on Thursday afternoon, employees were scheduled for back-to-back events until 10:00 p.m. The programmed events commenced again at 8:00 a.m. on Friday and proceeded until 10:00 p.m. that night. The schedule for the final day of the Conference included meetings from 8:00 a.m. to 1:30 p.m. Other than the evenings (after 10:00 p.m.) and a few 15-minute breaks, the employees were in organized activities for the entire Conference. Tropical's President, John Bauer ("Bauer"), testified that Tropical covered all of the expenses associated with the Conference. He further explained that the Conference is "once a year and the expectation is clear that [employees] are to attend all the events."

Thea Hatton ("Hatton"), one of the sales managers for Tropical, likewise testified that the whole Conference was a "package," and

2. Defendants also challenge the Commission's determination that Plaintiff "sustained an injury by accident to his right knee arising out of . . . his employment with Defendant-Employer" contained in finding of fact 22. As the issue of whether an accident arose out of the employment is a mixed question of law and fact, we deem it appropriate to address Defendants' contentions concerning finding 22 in our analysis of whether the findings of fact as a whole support the determination that Plaintiff's injury arose from his employment. See *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) ("[T]he determination of whether an accident arises out of . . . employment is a mixed question of law and fact, and this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence.").

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the employees were required to attend all portions of it. Another employee, Tobey Marshall ("Marshall"), similarly reported that the entire Conference was "a coordinated series of events" and that it was mandatory for Conference participants to attend the laser tag and bowling outing, as well as all of the other scheduled events. This evidence demonstrates that Tropical specifically planned each segment of the Conference and ensured turnout at each event by expressly mandating the employees' attendance. We therefore conclude that there was copious competent evidence supporting the Commission's finding that Tropical controlled and paid for all components of the Conference.

[2] Defendants next challenge the Commission's characterization of the laser tag and bowling activities in findings of fact 4 and 24 as more of a "business event" that "was calculated to further, directly or indirectly, Defendant-Employer's business" than a social or "employee appreciation" event. Defendants assert that (1) the laser tag outing was separate and distinct from the business portions of the Conference; and (2) there was no evidence offered to demonstrate that this activity "provided anything other than an immeasurable benefit to Tropical employee morale." Defendants' argument lacks merit.

Arnold Stone ("Stone"), Tropical's vice president of marketing and sales, testified that the overall evening at Sports Connection "was an essential part" of the three-day event and characterized the outing as part of the "team building" and "networking" content of the Conference. He explained that the Conference had a pretty tightly packed schedule with "not a whole lot of time for networking." He then described "networking" as "get[ting] to know people, just . . . get[ting] to meet people" and testified that the Sports Connection event was designed "to get people together so they would meet new people . . . and have fun together."

Hatton likewise stated that "the laser tag and bowling was an activity to help us meet the people that we work with every single day" and helped "[p]ut a name with the face — or with the voice . . . I talked to on a daily basis in the other divisions." Marshall testified that she believed the laser tag and bowling outing served a beneficial purpose to Tropical's business because the event facilitated interaction between employees at various offices and Tropical "want[ed] us to meet everybody at the other offices and kind of have a relationship because we do sometimes have to call . . . [and] ask for something." Thus, this testimony supported the Commission's finding that the laser tag and bowling event was an essential part of the Conference's content and served a business purpose for Tropical.

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Although Bauer gave testimony to the effect that the outing was not work- or business-related — testifying that the purpose of it was “[t]otally a social event, a thank you for coming to the event, and for a good sales year” — this testimony does not negate the fact that other competent evidence existed in the record to support the Commission’s finding to the contrary. Our Supreme Court has repeatedly explained that when reviewing an opinion and award from the North Carolina Industrial Commission, the Commission’s findings are binding if supported by competent evidence even if there is also evidence in the record that would support contrary findings. *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552-53 (2000).

An appellate court is not permitted “to weigh the evidence and decide the issue on the basis of its weight”; rather, our duty “goes no further than to determine whether the record contains any evidence tending to support the finding.” *Id.* at 115, 530 S.E.2d at 552 (citation and quotation marks omitted); *see also Philbeck v. Univ. of Mich.*, ___ N.C. App. ___, ___, 761 S.E.2d 668, 674 (2014) (explaining that because the Commission is the “sole judge of the credibility of the witnesses and the weight to be given their testimony. . . its determinations regarding the credibility of witnesses or the weight certain evidence is to be accorded are not reviewable on appeal.” (citations and quotation marks omitted)). Consequently, because findings of fact 4 and 24 are supported by the testimony of Stone, Hatton, and Marshall, these findings are binding on appeal.

As we have determined that the Commission’s findings of fact on this issue are supported by competent evidence in the record, we next turn to whether these findings adequately support the Commission’s conclusion that Plaintiff’s injury arose from his employment.

B. North Carolina Caselaw Analyzing Injuries Sustained at Employer-sponsored Events

[3] Our appellate courts have addressed on a number of occasions the applicability of the Act to injuries sustained by employees during employer-sponsored social and recreational events. *See Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 185, 639 S.E.2d 429, 433 (2007) (“The Act’s application to injuries occurring during recreational and social activities related to employment is well established in the jurisprudence of North Carolina.”). In *Perry v. Am. Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964), our Supreme Court set out guiding principles to be considered when determining the compensability of an injury sustained by an employee in this context. The plaintiff in *Perry* suffered a

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fractured cervical vertebra after diving into a hotel pool while attending an out-of-town sales conference that the defendant-employer arranged and financially sponsored. *Id.* at 273, 136 S.E.2d at 644-45. The Supreme Court explained that in determining whether the injury arose out of the plaintiff's employment,

[t]he question is whether [the plaintiff's] use of the pool was an authorized activity calculated to further, directly or indirectly, his employer's business, or whether it was employment connected to the extent that it may be concluded that there was a causal relation between the employment and the accident and the accident resulted from a risk involved in the employment. In providing plaintiff accommodations at Sedgefield Inn the employer provided him the recreational facilities maintained by the Inn for its guests. These recreational facilities undoubtedly influenced the employer in selecting Sedgefield Inn as the site for the meeting. Plaintiff was not required or expressly invited by his employer to use the swimming pool, but during his free time he was at liberty to use it. By providing the facility for him the employer impliedly invited him to use it, and he could swim or not at his option. Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment. Plaintiff's activity in swimming was not a function or duty of his employment, was not calculated to further directly or indirectly his employer's business to an appreciable degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the Inn. The injury did not have its origin in or arise out of the employment.

Id. at 274-75, 136 S.E.2d at 646 (internal citations omitted).

The Supreme Court acknowledged three scenarios where an injury sustained during a recreational or social activity *would* be compensable: (1) when it occurs "on the premises during a lunch or recreation period as a regular incident of the employment"; (2) when the employer "by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment"; and (3) when the employer derives a benefit from the

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activity “beyond the intangible value of improvement in [the] employee’s health and morale that is common to all kinds of recreation and social life.” *Id.* at 275, 136 S.E.2d at 646. The Court concluded that “the case at bar does not qualify for compensation . . . under these rules or suggested guides.” *Id.*

In *Chilton v. Bowman Gray Sch. of Med.*, 45 N.C. App. 13, 262 S.E.2d 347 (1980), this Court adopted a six-factor inquiry to further guide compensability determinations for injuries sustained at employer-sponsored recreational and social activities.

- (1) Did the employer in fact sponsor the event?
- (2) To what extent was attendance really voluntary?
- (3) Was there some degree of encouragement to attend evidenced by such factors as:
 - a. taking a record of attendance;
 - b. paying for the time spent;
 - c. requiring the employee to work if he did not attend; or
 - d. maintaining a known custom of attending?
- (4) Did the employer finance the occasion to a substantial extent?
- (5) Did the employees regard it as an employment benefit to which they were entitled as of right?
- (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

Id. at 15, 262 S.E.2d at 348. While these factors are not controlling, they can “serve as helpful guideposts” in the inquiry of whether an injury incurred by an employee at such an event arose out of the employment. *Frost*, 361 N.C. at 187, 639 S.E.2d at 434.

Defendants direct our attention to *Frost*, *Perry*, and *Chilton*, as well as to the following additional cases, in which our appellate courts have determined that the injuries sustained by employees at recreational or social events did not arise out of employment: *Berry v. Colonial Furniture Co.*, 232 N.C. 303, 60 S.E.2d 97 (1950), *Graven v. N.C. Dep’t*

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of *Pub. Safety-Div. of Law Enforcement*, ___ N.C. App. ___, 762 S.E.2d 230 (2014), and *Foster v. Holly Farms Poultry Indus., Inc.*, 14 N.C. App. 671, 189 S.E.2d 744, *cert. denied*, 281 N.C. 621, 190 S.E.2d 465 (1972).

In *Frost*, the plaintiff, an emergency medical technician for Salter Path Fire & Rescue (“Fire & Rescue”), was injured in a go-cart accident while attending a “Fun Day” organized by the community to thank the Fire & Rescue staff and volunteers. *Frost*, 361 N.C. at 182-83, 639 S.E.2d at 431. The Supreme Court concluded that the plaintiff’s injury did not arise from her employment because she attended the event “on a purely voluntary basis” and the activities “were authorized merely for her optional pleasure and recreation while she was off duty.” *Id.* at 186-88, 639 S.E.2d at 433-34.

In *Perry*, as discussed above, the Supreme Court held that the plaintiff’s injury at a hotel swimming pool the day before an employer-sponsored conference did not arise from his employment. The Court reached this result because the plaintiff’s “activity in swimming . . . was not calculated to further directly or indirectly his employer’s business to an appreciable degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the Inn.” *Perry*, 262 N.C. at 275, 136 S.E.2d at 646.

Berry involved a company-sponsored fishing trip to the coast “after the store had closed for the day’s work on Saturday.” *Berry*, 232 N.C. at 306, 60 S.E.2d at 100 (internal quotation marks omitted). The Supreme Court concluded that the plaintiff’s injury, which was sustained when he fell out of the company truck on the way to the coast, did not arise from his employment because “[b]usiness hours were over,” and there was no connection between the “trip for pleasure” and the employment. *Id.* at 307, 60 S.E.2d at 100.

Graven involved injuries sustained by two employees when their vehicle spun out of control after encountering a patch of ice on the way back from a holiday lunch “to celebrate the department’s hard work.” *Graven*, ___ N.C. App. at ___, 762 S.E.2d at 232 (quotation marks omitted). Because attendance at the lunch was purely voluntary, employees were required to pay for their own meals, and no formal speeches or awards were presented at the event, we concluded that “the holiday lunch is similar to the type of event that is described in *Perry* . . . which the Supreme Court stated would not arise out of the employment.” *Id.* at ___, 762 S.E.2d at 235.

In *Chilton*, the plaintiff, a professor at a medical school, broke his ankle while playing volleyball at a picnic organized by the medical school

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faculty so that incoming residents could become acquainted with faculty members. *Chilton*, 45 N.C. App. at 13-14, 262 S.E.2d at 347-48. This Court concluded that the plaintiff's injury did not arise from his employment based on the fact that (1) it was "not clear that the radiology department sponsored the picnic"; (2) attendance was voluntary and while faculty members "felt they should go . . . they were not compelled to do so"; (3) the participants were not paid for the time spent at the picnic; (4) the picnic "was not an event that [an] employee regarded as being a benefit to which he was entitled as a matter of right"; and (5) "the radiology department did not utilize the picnic as an opportunity to give a 'pep' talk or grant awards." *Id.* at 17-18, 262 S.E.2d at 350.

Finally, in *Foster*, this Court concluded that the plaintiff's fatal injury, which occurred when he was robbed by two men and shot while attending a conference that "had no connection with [the plaintiff's] work at [the defendant-employer's business]," did not arise from his employment with the defendant-employer. *Foster*, 14 N.C. App. at 672, 189 S.E.2d at 744. We held that because the evidence demonstrated that the plaintiff's attendance at the conference was solely for his own benefit (rather than for the benefit of the defendant-employer) and that the defendant-employer only paid the expenses of the trip "as a 'fringe benefit' or gesture of good will," the plaintiff's injury was not compensable. *Id.* at 674, 189 S.E.2d at 746.

C. Application of Prior Caselaw to Plaintiff's Injury

In the present case, Defendants argue the Commission's determination that Plaintiff's injury arose from his employment is (1) based solely on the fact that Tropical financially sponsored the laser tag event; and (2) inconsistent with the cases from North Carolina's appellate courts discussed above. We address each of these contentions in turn.

First, the evidence before the Commission demonstrated more than mere financial sponsorship of the laser tag outing by Tropical. The Commission concluded — and we agree — that the evidence of record showed Tropical also (1) expressly mandated employee attendance and implicitly encouraged participation in the laser tag and bowling activities; (2) fully financed the outing; and (3) benefited from the event. Indeed, the testimony from Plaintiff, Stone, Bauer, Hatton, and Marshall clearly demonstrates that Tropical required its employees to attend the laser tag and bowling activities by both taking attendance and making employees aware in advance that their attendance was mandatory.

The evidence also showed that actual participation in the activities was encouraged by Tropical. Specifically, Stone testified that Tropical

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“wanted people to participate” and “set up teams,” assigning each employee to a specific group and then assigning those groups to participate in either the laser tag or bowling activity. Furthermore, while Stone and Bauer both testified that “there weren’t any formal requirements [to participate,]” each also conceded that Tropical did not expressly inform the Conference attendees that only their attendance, rather than their physical participation in the activities, was mandatory.³

Given that employees were required to attend the laser tag and bowling activities and were assigned to teams by Tropical (thereby being at least implicitly encouraged to participate), we agree with the Commission’s conclusion that “the totality of the circumstances surrounding the purpose of and expectations surrounding Defendant-Employer’s conference and Plaintiff’s and other employees’ participation therein” points in favor of a determination that Plaintiff’s injury arose from his employment. See *Chilton*, 45 N.C. App. at 14-15, 262 S.E.2d at 348 (explaining that when employers sponsor recreational activities and an employee is injured, “it is clear that recovery will be allowed when attendance is required, [but] the question becomes closer when the degree of employer involvement descends to mere sponsorship or encouragement”).

Finally, there was evidence demonstrating that Tropical benefited from the activities at issue. First, Stone — one of the organizers of the Conference — explained that the Sports Connection event was “an essential part [of the meeting content]” and that the Conference, as a whole, was calculated to benefit the company by providing training and education for its employees. Stone further testified that the evening’s activities were also designed to bring Tropical employees from all of its regional offices together so that they could get to know each other. There was evidence that the teams were assigned purposefully to ensure a mix of employees from each of Tropical’s six offices so that employees would mingle with members of offices other than their own and be able to “[p]ut a name with the face — or with the voice” when they needed to reach out to another office for assistance or support. The record supports the conclusion that this occasion for networking and team building, which brought together geographically distant employees who were often required to seek support or guidance from each

3. Stone did state that in past company outings various attendees had elected not to physically participate and that “there was never any . . . forcing of anybody to do anything, other than be at the event.”

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other over the telephone, constituted a benefit to Tropical “beyond the intangible value of improvement in employee[] health and morale that is common to all kinds of recreation and social life.” *Perry*, 262 N.C. at 275, 136 S.E.2d at 646.

In sum, because Tropical (1) specifically required its employees to attend the event; (2) encouraged their participation in the laser tag activity; and (3) derived a business benefit from the Conference as a whole (of which the outing to Sports Connection was an “essential part”) and from the team-building and networking opportunities generated thereby, we believe this case is distinguishable from the facts and circumstances presented in *Frost*, *Perry*, *Berry*, *Graven*, *Chilton*, and *Foster*. None of those cases involved a situation where the employee’s attendance was expressly mandated at the event in question or where the employer received a benefit from the event beyond an intangible improvement to employee morale. We therefore conclude that the nexus between the injury and the employment in the present case was substantially greater than that in the cases relied upon by Defendants. *See Martin v. Mars Mfg. Co.*, 58 N.C. App. 577, 579-81, 293 S.E.2d 816, 818-19 (concluding that employee’s injury sustained while dancing at employer-sponsored Christmas party was distinguishable from *Perry* and its progeny where event was sponsored and partially financed by employer, attendance was encouraged, and employer benefited from event “through such tangible advantages as having an opportunity to make speeches and present awards”), *cert. denied*, 306 N.C. 742, 295 S.E.2d 759 (1982). Accordingly, the Commission did not err in finding that Plaintiff’s injury arose out of his employment with Tropical.

II. Injury by Accident

[4] Defendants next contend that Plaintiff failed to prove that he suffered an injury by *accident* because Plaintiff was “unable to discern when exactly his alleged knee injury occurred and what exactly he was doing — whether it be twisting, jumping, running, bending, stooping, or nothing at all — when his knee pain began.”

Our Court has previously explained that when determining compensability under the Act,

[t]he terms “accident” and “injury” are separate and distinct concepts, and there must be an “accident” that produces the complained-of “injury” in order for the injury to be compensable. An “accident” is an “unlooked for event” and implies a result produced by a “fortuitous cause.” If an employee is injured while carrying on the employee’s

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usual tasks in the usual way the injury does not arise by accident. In contrast, when an interruption of the employee's normal work routine occurs, introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred. The "essence" of an accident is its "unusualness and unexpectedness"

Gray v. RDU Airport Auth., 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010) (internal citations, select quotation marks, and brackets omitted).

For purposes of the Act, "an accident must result from 'an . . . event,' and multiple events occurring over a period of time, therefore, do not constitute an 'accident.'" *Lovekin v. Lovekin & Ingle*, 140 N.C. App. 244, 248, 535 S.E.2d 610, 613, *disc. review denied*, 353 N.C. 266, 546 S.E.2d 105 (2000). Likewise, this Court has explained that in order to demonstrate an injury by accident, "[t]here must be a specific fortuitous event, rather than a gradual build-up of pain." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 551, 335 S.E.2d 502, 504 (1985). Defendants contend the Commission's findings of fact do not support its conclusion that Plaintiff sustained an injury by accident because it made "no determinative or meaningful finding regarding what 'specific fortuitous event' caused his alleged pain."

In its Opinion and Award, the Commission determined in findings of fact 6 and 22 that the right knee injury Plaintiff sustained while playing laser tag constituted an injury by accident because (1) "these activities were not activities [Plaintiff] normally performed as a Territory Manager/Outside Sales Representative for Defendant-Employer"; and (2) the act of playing laser tag "constituted an interruption of Plaintiff's regular work routine and the introduction of unusual conditions likely to result in unexpected consequences." Those findings of fact, which are supported by competent evidence in the record, demonstrate that the requisite "specific fortuitous event" was the laser tag activity itself. Evidence as to the exact moment in time or precise motion that tore his medial meniscus and lateral meniscus was not necessary to establish the fact that Plaintiff's injury while playing laser tag — a significant departure from Plaintiff's customary job duties (which "were essentially administrative in nature and required him to perform normal and customary sales activities . . . and customer service work") — constituted an injury by accident. *See Gray*, 203 N.C. App. at 525, 692 S.E.2d at 174 (explaining that in order for injury sustained to qualify as a compensable injury by accident for purposes of the Act, "the injury must involve more than the employee's performance of his or her usual and customary duties in the usual way").

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Plaintiff's testimony that he felt a "sharp pain" in his leg approximately 15 minutes into the activity and that he "could tell something was wrong" once he attempted to move from his position was sufficiently specific to demonstrate that the injury he suffered was neither a mere "gradual build-up of pain," *Bowles*, 77 N.C. App. at 551, 335 S.E.2d at 504, nor a result of "multiple events occurring over a period of time," *Lovekin*, 140 N.C. App. at 248, 535 S.E.2d at 613. Moreover, Defendants have not directed us to any case law requiring greater specificity under analogous circumstances so as to mandate a contrary result on this issue. Accordingly, the Commission did not err in determining that Plaintiff's right knee injury constituted an injury by accident.

III. Temporary Total Disability Benefits

[5] In their final argument on appeal, Defendants contend that the Commission's determination that "Plaintiff was and remained disabled as of 24 May 2013, the date he underwent total knee replacement surgery" was not supported by sufficient evidence. We are not persuaded.

In its Opinion and Award, the Commission concluded that

[a]s a result of the injury and resulting knee surgeries, Plaintiff was unable to earn the same wages he was earning at the time of the injury in the same or any other employment beginning May 24, 2013, and he is therefore entitled to compensation pursuant to N.C. Gen. Stat. § 97-29 from that date until he returns to work or further order of the Industrial Commission.

Defendants argue that this award of temporary total disability benefits was improper because there was no evidence presented regarding Plaintiff's work restrictions following his knee replacement surgery. Under North Carolina law,

[t]he term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. N.C. Gen. Stat. § 97-2(9) (2013). Accordingly, to support a conclusion of disability, the Commission must find

(1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other

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employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Philbeck, ___ N.C. App. at ___, 761 S.E.2d at 674.

It is the claimant's burden to establish the existence and extent of his disability, and he may do so by presenting medical evidence that he is physically incapable of work in any employment because of his injury. *See Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 420-21, 760 S.E.2d 732, 736-37 (2014) (explaining that medical evidence demonstrating (1) the plaintiff is incapable of earning wages; and (2) this incapability was caused by the injury, will support legal conclusion of disability).

Here, Plaintiff underwent a total right knee replacement surgery performed by Dr. Barnett on 24 May 2013. Dr. Barnett was deposed on 11 June 2013, less than a month after this surgery and prior to Plaintiff's initial post-operative visit. Dr. Barnett testified as follows:

[Plaintiff's counsel:] How long do you anticipate [Plaintiff] will be recovering post-surgically from the surgery you undertook a couple of weeks ago? In other words, when will he be able to try to return to some kind of work or look for work?

[Dr. Barnett:] I think typically the recovery is about three to six months after a knee replacement.

Given that Plaintiff's post-surgery follow-up appointment had not yet occurred at the time of the deposition, it was appropriate for Dr. Barnett to express his opinion as to Plaintiff's recovery in general terms for the average knee replacement patient. Contrary to Defendants' assertion on appeal, the above testimony from Dr. Barnett supports the Commission's finding of fact that Dr. Barnett "did not expect Plaintiff to be able to return to work for three to six months."

Moreover, we believe that this testimony concerning surgical recovery time — which was in direct response to a question as to when Plaintiff would be able to attempt to return to some kind of employment — was sufficient to establish that Plaintiff could not work in any capacity immediately following the surgery that was necessitated by his compensable injury. Thus, contrary to Defendants' assertions, the absence of evidence as to the type of limited or restricted work Plaintiff could perform does not bar his disability claim because Dr. Barnett's testimony supports the

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conclusion that Plaintiff was incapable of performing *any* work after his knee replacement. Because the medical evidence indicated that Plaintiff was temporarily incapable of earning wages in any employment, there was sufficient evidence for the Commission to conclude that Plaintiff was temporarily totally disabled as of 24 May 2013. Defendants' argument on this issue is therefore overruled.

Conclusion

For the reasons stated above, we affirm the Commission's 10 June 2014 Opinion and Award.

AFFIRMED.

Judges STROUD and DILLON concur.

IN THE MATTER OF THE ESTATE OF CHARLES W. PICKELSIMER, JR.

No. COA14-1192

Filed 18 August 2015

1. Evidence—caveat—excluded evidence—other evidence admitted

In a caveat to a will where the caveators argued that the trial court erred by excluding testimony about the reason for the decedent's disenchantment with a beneficiary, the jury heard the gist of the challenged testimony, and the admission of additional testimony regarding the reason the decedent removed himself from the Brevard College Board in the late 1980s would not have altered the jury's verdict

2. Evidence—challenged evidence—not actually excluded

In a caveat proceeding, there was no merit to the caveators' contention that the trial court erred by excluding testimony as to the decedent's statements that would allegedly shed light on his relationship with his children or on his mental condition. In fact, the challenged statement, "I am not mentally up for it right now," made when the decedent's daughter asked to talk about business matters, was not excluded.

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3. Wills—reference to will as exhibit—sufficiently accurate

The trial court did not err or abuse its discretion in a caveat proceeding by referring to propounders' proffered "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010" as "Propounders Exhibit 2" on the jury verdict sheet. Although the caveators argued that the record failed to contain a paper writing marked as "*Propounders'* Exhibit 2, the propounders, caveators, and the trial court agreed to compile exhibits into a notebook referred to as Courtroom Exhibit 1, with the decedent's Last Will and Testament included in Courtroom Exhibit 1 and marked for identification and referred by propounders as Exhibit 2. The phraseology of the issues presented was sufficiently accurate to resolve any factual controversies and enabled the trial court to fully render judgment in the cause; further, the trial court's judgment clearly resolved any perceived ambiguity.

Appeal by caveators from judgment entered 6 December 2013 by Judge Anderson Cromer in Transylvania County Superior Court. Heard in the Court of Appeals 2 June 2015.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for caveator-appellants.

Parker Poe Adams & Bernstein LLP, by Chip Holmes and Jessica C. Dixon, for propounder-appellee Brevard College.

Long Parker Warren Anderson & Payne, P.A., by Robert B. Long, Jr., Esq., and Philip S. Anderson, Esq., for propounder-appellee David Albertson, Executor of the estate of Charles W. Pickelsimer, Jr.

Roberts & Stevens, P.A., by Phillip Jackson, Esq., for propounder-appellee Transylvania Community Hospital, Inc. d/b/a Transylvania Regional Hospital.

Wishart Norris Henninger & Pittman, by Robert Wishart, Esq., and Shumaker, Loop & Kendrick, LLP, by June Allison, Esq., for propounder-appellee Betty McCrary.

Ramsey & Pratt, P.A., by Michael K. Pratt, for Shelter Available for Family Emergency (SAFE), Inc., of Transylvania County, did not file a brief on appeal.

IN RE ESTATE OF PICKELSIMER

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BRYANT, Judge.

Where caveators cannot establish prejudice as a result of the trial court's ruling excluding certain testimony, we find no prejudicial error. Where propounders, caveators, and the trial court all acknowledged during trial that propounders' "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010" would be admitted into evidence as Exhibit 2, the trial court cannot be held to have abused its discretion in referring to the 17 August 2010 will as Propounders' Exhibit 2.

Charles W. Pickelsimer, Jr. (Charles or the decedent), was born on 25 May 1931. He was a resident of Transylvania County and was married to Ann B. Pickelsimer. They had two children, Lynn P. Williams and Charles W. Pickelsimer, III (Chuck). In the 1960s, Charles inherited from his father stock in a family telecommunications company, Citizen's Telephone Company. For Christmas, Charles often gave his children and grandchildren stock certificates in the company, certificates that accumulated over the years. In 2008, Charles began experiencing severe headaches. He was diagnosed with temporal arteritis and began experiencing significant memory lapses.

In December 2008, Charles sold the company. According to David Albertson, the executor of Charles's estate and an employee of Citizen's Telephone Company since 1963 and serving as secretary-treasurer controller since 1983, near the time of the sale, the company had accumulated cash reserves in the amount of \$19 million. A dividend was declared and the cash was distributed to shareholders just before the company was sold. Charles' daughter, Lynn, and Lynn's daughter, Whitney A. Butterworth, held an aggregate of ten percent of the company stock. Likewise, Charles' son, Chuck, and his children, also held an aggregate of ten percent of the stock. The stock dividend distribution yielded Lynn and her daughter between \$1.9 and \$2 million, the same approximate yield that went to Chuck and his children. Citizen's Telephone Company was sold for \$65 million. At the time of the sale, due to their aggregate stock holdings, Lynn and her daughter received approximately \$6 million, as did Chuck and his children.

In 2009, Charles and his wife, Ann executed an estate plan designed to protect their assets and minimize estate taxes during conveyance. The 2009 Estate Plan included a will and a revocable trust (the "2009 Will" and the "2009 Trust"). Lynn, Chuck, and Whitney (caveators) were the primary beneficiaries of the 2009 Estate Plan.

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In December 2009, Ann was diagnosed with cancer. Her health declined rapidly, and she died on 20 March 2010. In January 2010, just prior to Ann's death, Charles was diagnosed with mild dementia and memory loss. Following Ann's death, Charles's condition continued to decline. According to caveators, he became "increasingly erratic and paranoid. At times he was not oriented to time and place." Caveators alleged that during this time, Betty McCrary (friend of Charles Pickelsimer and former friend of the Pickelsimer family), Albertson, and possibly others forced themselves upon Charles in order to drive a wedge between him and his children, and that "one or more of these individuals told Decedent repeatedly that his children had stolen money from him and were trying to steal more"

In April 2010, Charles' daughter Lynn learned that Charles had revoked the durable power of attorney and healthcare power of attorney held by her since Charles executed it in 2009. Then, in August 2010, Charles revoked the 2009 Estate Plan and executed a new 2010 Estate Plan consisting of a 2010 Will and a 2010 Trust. Charles Pickelsimer, Jr., died on 6 July 2011. Charles was survived by his two children, caveators Lynn P. Williams and Charles W. Pickelsimer, III, three grandchildren—including caveator Whitney A. Butterworth—and one great-grandchild.

On 11 July 2011, the Transylvania County Clerk of Court received a four-page document titled "Last Will and Testament of Charles W. Pickelsimer, Jr.," dated 17 August 2010. The Clerk of Court admitted the document to probate on 11 July 2011 and appointed David Albertson as Executor of decedent's estate. According to caveators, they only learned of the 2010 Will and 2010 Trust after Charles' death.

On 20 November 2012, in Transylvania County Superior Court, caveators Lynn P. Williams, Charles W. Pickelsimer, III (Chuck), and Whitney A. Butterworth, individually and on behalf of their minor and unborn issue, entered a caveat to the probate of the document titled "LAST WILL AND TESTAMENT OF CHARLES W. PICKELSIMER, JR.," dated 17 August 2010.

Caveators acknowledged that pursuant to the 2010 Will, David Albertson, Betty McCrary, Shelter Available for Family Emergency (SAFE), Inc., Brevard College, and Transylvania Hospital, Inc., (proponders) had an interest in Charles's estate. However, caveators allege that McCrary, Albertson, and others prevailed upon Charles to disinherit his children and grandchildren and instead benefit McCrary, Albertson, and others, and that they interfered with caveators' attempts to spend time with their father. Caveators charge that Charles's 2010 Will and

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2010 Trust “disinherit[s] his own family and leav[es] substantial assets instead to or for the benefit of Mr. Albertson, Ms. McCrary and others who were not the natural objects of his bounty.” Caveators assert that “[t]he 2010 Will and 2010 Trust do not reflect the desires and wishes of [Charles Pickelsimer, Jr.]”

All propounders received a citation and notice of caveat, and all propounders except SAFE (Shelter Available for Family Emergency, Inc.) responded to the citation and notice of caveat.

A jury trial on the caveat proceeding was held in Transylvania County Superior Court during the 14 October 2013 Civil Session before the Honorable Anderson Cromer, Judge presiding. Extensive testimony was presented by both propounders and caveators. During the course of the proceeding, the last will and testament that Charles Pickelsimer, Jr., signed on 17 August 2010 was introduced as Exhibit 2. The trial court entered a directed verdict for propounders determining they had met their burden of proof required to establish that the challenged will was validly executed. The burden of proof then shifted to caveators to establish that the will was procured by undue influence. At the conclusion of all the evidence, the jury returned a unanimous verdict against the caveators, determining as a matter of fact that the execution of Propounders’ Exhibit 2 was not procured by undue influence. Further, the jury found that “Propounders’ Exhibit 2 and every essential part of it” was the last will and testament of Charles W. Pickelsimer, Jr. The trial court entered judgment on 6 December 2013 in accordance with the jury verdict and ordered that “[t]he document dated 17 August 2010, marked as Propounders’ Exhibit 2 at trial, propounded for probate, and every part thereof, is the Last Will and Testament of Charles W. Pickelsimer, Jr., and it is hereby admitted to probate in solemn form.”

Caveators moved for a new trial; however, on 30 December 2013, the trial court denied the motion for a new trial. Caveators then entered notice of appeal from the trial court’s 6 December 2013 order admitting to probate the Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010.

Legal Background

“A caveat is an *in rem* proceeding. G.S. § 31-32. It is an attack upon the validity of the instrument purporting to be a will. The will and not the property devised is the res involved in the litigation.” *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961) (citation omitted). The

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administration of a decedent's estate is a process necessarily overseen by the Clerk of Superior Court. *In re Will of Durham*, 206 N.C. App. 67, 79, 698 S.E.2d 112, 122 (2010). "Upon the filing of a caveat, the clerk shall transfer the cause to the superior court for trial by jury. The caveat shall be served upon all interested parties in accordance with . . . [our] Rules of Civil Procedure." N.C. Gen. Stat. § 31-33(a) (2013). "The 'parties' are not parties in the usual sense but are limited classes of persons specified by the statute who are given a right to participate in the determination of probate of testamentary script. It [is] for the trial judge to determine what persons fit the statutory description" *In re Ashley*, 23 N.C. App. 176, 181, 208 S.E.2d 398, 401 (1974) (citations omitted).

The issue of whether the decedent made a will and whether a given document is his will, is known as *devisavit vel non*, translated from the Latin as "he devises or not." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 272 (2nd ed. 1995). "*Devisavit vel non* [sic] requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987) (citation omitted).

In re Will of Mason, 168 N.C. App. 160, 162, 606 S.E.2d 921, 923 (2005).

In a caveat proceeding, the burden of proof is upon the propounders to prove that the instruments in question were executed with the proper formalities required by law. *In re Will of West*, 227 N.C. 204, 41 S.E.2d 838 (1947). Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that the execution of the will was procured by undue influence. *Id.*

In re Andrews, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980).

In this appeal caveators raise two issues: whether the trial court erred by (I) excluding testimony of decedent's statements; and (II) entering a directed verdict and judgment for *devisavit vel non* on the issue of whether "propounders exhibit 2" constituted the last will and testament of Charles W. Pickelsimer, Jr.

I

[1] Caveators argue that the trial court committed prejudicial error in excluding testimony of statements made by Charles under the Dead

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Man's Statute. Caveators contend that had the jury heard the excluded testimony, a different result would have likely ensued. We disagree.

[T]he standard of review for use [in reviewing a trial court's exclusion of evidence pursuant to our Rules of Evidence, Rule 601(c)] is one that involves a *de novo* examination of the trial court's ruling, with considerable deference to be given to the decision made by the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving application of Rule 601(c), including the provisions which result in "opening the door" to the admission of otherwise prohibited testimony.

In re Will of Baitschora, 207 N.C. App. 174, 181, 700 S.E.2d 50, 55-56 (2010).

Rule 601(c) of our Rules of Evidence is commonly referred to as the Dead Man's Statute. It is entitled "Disqualification of interested persons" and provides as follows:

Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his or her interest or title by assignment or otherwise, shall not be examined as a witness in his or her own behalf or interest, or in behalf of the party succeeding to his or her title or interest, against the executor, administrator or survivor of a deceased person, or the guardian of an incompetent person, or a person deriving his or her title or interest from, through or under a deceased or incompetent person by assignment or otherwise, concerning any oral communication between the witness and the deceased or incompetent person. However, this subdivision shall not apply when:

- (1) The executor, administrator, survivor, guardian, or person so deriving title or interest is examined in his or her own behalf regarding the subject matter of the oral communication.
- (2) The testimony of the deceased or incompetent person is given in evidence concerning the same transaction or communication.

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(3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, guardian or person so deriving title or interest.

N.C. Gen. Stat. § 8C-1, Rule 601 (2013).

Caveators first contend that propounders opened the door to the admission of evidence regarding Charles Pickelsimer's statements on why he had "fallen out" with Brevard College. Caveators contend that the excluded evidence goes to a factual issue central to this case: Charles' relationship with Brevard College.

During the trial, propounders presented testimony from John Kelso, the attorney who drafted the 2010 Will and 2010 Trust. Kelso testified to conversations he had with Charles, particularly one that took place on 16 July 2010 during a brainstorming session during which Charles indicated to whom he might leave money or assets, how to go about conveying those assets, and charitable giving. During his testimony Kelso referred to notes he had taken during the meeting.

A. Don't want to leave them a goddamn thing because they have basically stolen his money from him. He is absolutely sure of that. Is not exactly sure of where he does want to leave things to, but is very sure of where he doesn't want to leave things.

Q. And this doesn't indicate who "them" references. . . .

A. His children.

. . .

A. Is interested in some charitable organizations. Is closest to Brevard College of any of the organizations around here. Maybe some for the hospital. He knows his children were afraid of his getting remarried. . . . If he was going to leave it to someone now, it would be Betty McCrary. She has three children who have been nicer to him than his own children. . . . He is thinking on Cascade, if he can get others to go along with him, of selling it to the federal government

. . .

Thinking about an amount for Betty. Maybe leave the Cascade Power stock in a way that it might somehow go to the State. Want to leave some for SAFE, a

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battered woman's shelter, help women and children get out of abusive homes.

Following Kelso's testimony, Caveators submitted a brief to the trial court arguing that propounders had opened the door to testimony otherwise excluded by Rule 601(c). The trial court ruled that Kelso's testimony of oral communications with Charles had indeed opened the door to testimony by other interested parties of oral communications with Charles. Caveators then submitted a proffer of what their witnesses might say if asked questions about communications with Charles. Specifically, in regard to the support of Brevard College, caveators' proffer stated the following:

[Charles Pickelsimer's children, Chuck and Lynn Williams, would testify] that they had multiple oral communications with Mr. Pickelsimer during which he stated his displeasure with Brevard College, the decisions of the administration, and lack of oversight of its trustees. Charles III recalls conversations with Mr. Pickelsimer after he resigned from the college board during which he stated that that [sic] he was "so disgusted with the college he would not give them a God damned dime" (or words to that effect). These conversations continued into the late 2000s. Mr. Pickelsimer was offended that the "Pickelsimer Memorial Garden" with reflecting pool and cross in front of the Jones Dormitory had been filled in and renamed the "McClarty Garden," with no substitute location to honor the family's past giving.

The trial court ruled that caveators would be allowed to testify regarding specific conversations with Charles about Brevard College as set forth in their proffer.

Lynn Williams thereafter testified in pertinent part:

- A. [Charles Pickelsimer, Jr.] served on the board [of Brevard College] for a short time. *And when he left the board, he left because he was disturbed by the lack of oversight in the spending.* He felt that the college president –

...

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[Counsel for propounders]: Objection

The Court: Sustained.

...

Q. As it relates specifically to charitable giving after that, after he resigned and the reasons he told you why he resigned, *did he tell you his views about charitable giving to Brevard College?*

A. *Yes, he did.*

...

He didn't feel too comfortable doing it.

(Emphasis added). Lynn testified she was surprised to see that her father had included Brevard College as a beneficiary to his will. The discussions she had had with her father indicating his lack of any comfort with charitable giving to Brevard College had continued into the late 2000s.

Caveators contend that the trial court erred in excluding testimony explaining the reason for Charles' disenchantment with Brevard College, and that such exclusion was highly prejudicial. They assert that, in light of testimony about several meetings which occurred following the death of Ann Pickelsimer between Charles Pickelsimer and a former president of Brevard College and Kelso's testimony concerning Charles' desire to benefit Brevard College in his 2010 Will, this desire "represented a seismic shift in attitude toward Brevard College occurring in the summer of 2010 [and] would be highly relevant to the level of influence being asserted by [the former President] in the weeks and months following Ann's death." Specifically, caveators contend that Lynn's excluded testimony concerning Charles' falling out with Brevard College would show that for decades Charles remained disturbed by the way the College was operated, "making it very unlikely he would have left his sizeable residual estate, including the 100 acre 'donut hole' property, to Brevard College unfettered[,] claiming he was 'closest' to Brevard College. This evidence goes directly to the 'extent' of the influence asserted by [former Brevard College President] on behalf of Brevard College."

We find this argument unpersuasive, mainly because the jury heard the gist of the testimony caveators now say was excluded. Where the trial court admitted testimony regarding the reason Charles removed himself from the Brevard College Board in the late 1980's, we fail to

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see the merit in caveators' argument.¹ Further, Lynn testified regarding Charles' views on charitable giving to Brevard College, and why it was unlikely Charles would leave a sizeable, unrestricted residuary estate gift to the college. We do not agree that the admission of additional testimony regarding the reason Charles removed himself from the Brevard College Board in the late 1980's would have altered the jury's verdict. We note that caveators' proffer regarding Charles being offended that the former "Pickelsimer Memorial Garden" on the campus had been altered and renamed the "McClarty Garden," might have been relevant on the issue of why Charles may have been continually displeased with Brevard College; however, this portion of the proffer was not offered as testimonial evidence.

[2] Caveators also contend that Charles' statement to his daughter Lynn during a discussion regarding a transfer of \$12.9 million from his trust was improperly excluded. Lynn testified that upon learning her mother's diagnosis was terminal, she without telling Charles, transferred \$12.9 million from Charles' trust to Ann's trust to avoid estate taxes. Caveators assert that the exclusion of Charles response to Lynn's attempt to discuss the transfer was highly prejudicial as it precluded the jury from hearing the caveator's version of Charles' comments that would have shed light on their relationship as well as Charles' mental condition. In the proffer of what caveators expected their witnesses would say when questioned, caveators proposed that Lynn and Chuck would testify that "they had oral communications with [Charles] on several occasions to tell him about the transfers after they were made but before April 19, 2010, but that he told them that he was 'not mentally up' for the discussion (or words to that effect)."

At trial, Lynn provided the following pertinent testimony:

- Q. Since he lost all control of that money how did he come out better once it was transferred to your mother's trust than before you took it from him?
- A. Because that transfer made his dream come true.
- Q. So then you would have no problem discussing it with him in the eight weeks that transpired between early March and April 28th; correct?

1. Lynn Williams testified that "Charles served on the board [of Brevard College] for a short time. *And when he left the board, he left because he was disturbed by the lack of oversight in the spending.*"

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- A. My father was not well and he was in deep grief. I said, “I have business things I need to talk to you about, daddy.” And he said, “I am not mentally up for it right now.”

Lynn’s testimony appears to be in accordance with the proffer that caveators anticipated she and/or Chuck would state if questioned about the transfer of \$12.9 million from Charles’ trust account to Ann’s trust account. Therefore, we find no merit to caveators’ contention that the trial court erred by excluding testimony as to Charles’ statements that would shed light on his relationship with his children or on his mental condition where in fact the challenged statement “I am not mentally up for it right now” was not excluded. Accordingly, we find caveators suffered no prejudicial error and overrule caveators’ argument that the trial court erred in excluding testimony of statements made by Charles under the Dead Man’s Statute.

II

[3] Next, caveators contend that the trial court erred in entering a directed verdict and judgment for *devisavit vel non* on the issue of whether “Propounders’ Exhibit 2” constituted the last will and testament of Charles Pickelsimer, Jr. Specifically, caveators contend that no exhibit was identified as Propounders’ Exhibit 2 in the record. As such, caveators contend that the trial court erred in entering a directed verdict concluding that Propounders’ Exhibit 2 was executed according to the law for a validly executed will and that the trial court erred in entering judgment on the jury verdict where the jury returned a verdict on the validity of “Propounders’ Exhibit 2” which does not appear in the record. On this basis, caveators contend they are entitled to a new trial. We disagree.

We review the number, form and phraseology of the issues presented to the jury for abuse of discretion. *Griffis v. Lazarovich*, 161 N.C. App. 434, 440, 588 S.E.2d 918, 923 (2003).

In their brief to this Court, caveators acknowledge that

a document purporting to be Charlie’s 2010 Will was included in a notebook of documents which was received into evidence as “Courtroom Exhibit 1.” . . . It is also true that a document dated 17 August and testified to as a “pou- rover last will and testament” was identified as “Exhibit 2, Tab 2” A “Courtroom Exhibit 2” notebook was also identified. . . . In “Courtroom Exhibit 1,” there is a

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document labeled “Defendant’s Exhibit 2” which purports to be a Last Will and Testament signed on 17 August 2010.

The record reflects that during trial and prior to the testimony of Kelso, the attorney who drafted the 2010 will, counsel for propounder Albertson announced to the trial court that

we have prepared exhibit notebooks with the exhibits that the caveators have agreed are authenticated for the purposes of the pretrial order. And we propose to give those to the jurors at the beginning of Mr. Kelso’s deposition. . . . [W]e can direct them to the right tab as we go and move to admit as we go with the Court’s permission.

The trial court stated that “I appreciate you all agreeing on the notebooks and all of the documents being admitted. That is going to move things along a lot. And you don’t have to worry about making sure you’ve identified everything and you proffered it the proper way. You’ve all agreed.” Counsel for Albertson clarified that each exhibit in the notebook was internally numbered. The trial court stated that while the exhibits were to be internally numbered, the notebook itself would be referred to as Courtroom Exhibit 1.

[Propounder Counsel]: Your Honor, I don’t know that I ever formally moved to admit the evidence, the exhibits that I introduced.

The Court: Are you talking about Exhibit 1 and all of the contents?

[Propounder Counsel]: Yes. Everything.

The Court: I understood that there was an agreement that they would be.

[Caveator Counsel]: Yes.

The Court: And they are. We all had a discussion about it.

Before the jury, Debra Cooper, Charles Pickelsimer’s former secretary, was asked to identify Exhibit 2 at Tab 2 in the notebook provided. She acknowledged that the document was entitled “the Last Will and Testament of Charles W. Pickelsimer, Jr.” Moreover, the record on appeal provides that within the contents of Courtroom Exhibit 1 (the notebook) is contained Exhibit 2 – the “Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010.”

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At the close of the evidence, the jury returned verdicts finding that the execution of Propounders' Exhibit 2 was not procured by undue influence. The jury further found that "Propounders' Exhibit 2 and every essential part of it, [was] the last will and testament of Charles W. Pickelsimer, Jr." On 6 December 2013, the trial court entered judgment in accordance with the jury verdicts and ordered that "[t]he execution of the document, entitled 'Last Will and Testament of Charles W. Pickelsimer, Jr.,' dated 17 August 2010, marked as propounders' Exhibit 2 at trial was not procured by undue influence" and "is hereby admitted to probate in solemn form."

Caveators now argue that the record fails to contain a paper writing marked as "*Propounders'* Exhibit 2" and that the trial court erred in entering judgment in accordance with the jury verdict. Caveators contend the jury entered *devisavit vel non* based on a "Propounders' Exhibit 2" which does not appear in the record. At oral argument, caveators extended this argument pointing out that this was an *in rem* proceeding: it was not about the parties but, rather, the will of Charles Pickelsimer, Jr. The burden of proof to establish the validity of the will was on the propounders, and caveators could not waive the issue of validity. By tasking the jury with determining whether Propounders' Exhibit 2 was the last will and testament of Charles Pickelsimer, Jr., and entering judgment in accordance with the jury's verdict in the affirmative, caveators claim that an ambiguity was created. Caveators assert that as no exhibit was entered into the record as "Propounders' Exhibit 2," the Clerk of Court cannot be certain as to which document the jury found to be Charles Pickelsimer, Jr.'s last will and testament. We find this argument unpersuasive.

It is an elementary principle of law that the trial judge must submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings and supported by the evidence. The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.

Griffis, 161 N.C. App. at 440, 588 S.E.2d at 922–23 (citations and quotations omitted).

Here, propounders, caveators, and the trial court agreed to compile exhibits into a notebook referred to as Courtroom Exhibit 1. The record

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reflects that Charles Pickelsimer, Jr.'s Last Will and Testament dated 17 August 2010, included in Courtroom Exhibit 1, was marked for identification by propounders and referred to by propounders as Exhibit 2. Propounders moved that all exhibits included in Courtroom Exhibit 1 be admitted in evidence, and they were admitted by the trial court with no objection by caveators. Neither during the course of the trial, the charge conference, nor following the jury instruction² did caveators raise an objection to the referral of Charles Pickelsimer, Jr.'s 2010 Will as Propounders' Exhibit 2.

As the phraseology of the issues presented in this caveat proceeding was sufficiently accurate to resolve any factual controversies and enabled the trial court to fully render judgment in the cause, the trial court did not err or abuse its discretion in referring to propounders' proffered "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010" as "Propounders Exhibit 2" on the jury verdict sheet.

Even if we were to accept caveators' contention that an ambiguity was created where the jury verdict sheet referenced Propounders' Exhibit 2 while no exhibit marked as *Propounders' Exhibit 2* was entered into the record, we note that an exhibit marked as "Exhibit 2" was introduced by propounders as their exhibit and was entered in the record. Further, we note that the trial court's judgment clearly resolves any perceived ambiguity.

1. The execution of the document entitled "Last Will and Testament of Charles W. Pickelsimer, Jr.," dated 17 August 2010, marked as Propounders' Exhibit 2 at trial, was not procured by undue influence.
2. The document dated 17 August 2010, marked as Propounders' Exhibit 2 at trial, propounded for probate, and every part thereof, is the Last Will and Testament of Charles W. Pickelsimer, Jr. and it is hereby admitted to probate in solemn form.

2. In his charge to the jury, the trial court specifically stated:

The Propounders seek to establish the writing as a valid will. The Caveators contest that this . . . is a valid will for certain legal reasons, which I will discuss throughout my following instructions.

The writing at issue was marked as Propounders' Exhibit No. 2, and it's in your white book as Exhibit No. 2, and is dated August 17, 2010.

(Emphasis added).

IN RE D.L.P.

[242 N.C. App. 597 (2015)]

[T]he existence of an ambiguity in a court order is . . . a question of law, but resolution of the ambiguity is a question of fact. *See Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002) (Trial court's determination of whether the language in a consent judgment was ambiguous is a question of law). The existence of an ambiguity in the orders is a question of law to be decided by the judge and is not a question of fact for the jury.

Emory v. Pendergraph, 154 N.C. App. 181, 185, 571 S.E.2d 845, 848 (2002).

Therefore, we hold that any ambiguity created in this case was resolved by the trial court as a matter of law. *See id.* As the assertions of the parties appearing before the trial court made clear, the Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010 is Propounders' Exhibit 2. Accordingly, caveators' arguments on these issues are overruled, and the judgment of the trial court is affirmed.

NO PREJUDICIAL ERROR; NO ERROR.

Judges STEPHENS and DIETZ concur.

IN THE MATTER OF D.L.P. AND H.L.P.

No. COA 15-168

Filed 18 August 2015

**Child Abuse, Dependency, and Neglect—incompetent parent—
Rule 17 guardian ad litem appointed—not present during
hearing**

On appeal from an order finding respondent-mother's children neglected and dependent juveniles, the Court of Appeals held that the trial court erred by proceeding when respondent's Rule 17 guardian ad litem (GAL) was not present. The trial court's orders were vacated and the case was remanded.

Appeal by Respondent from orders entered 18 November 2014 by Judge Robert Martelle in Rutherford County District Court. Heard in the Court of Appeals 27 July 2015.

IN RE D.L.P.

[242 N.C. App. 597 (2015)]

Merri B. Oxley for petitioner-appellee Rutherford County Department of Social Services.

Lee F. Taylor for guardian ad litem.

Robert W. Ewing for respondent-appellant mother.

TYSON, Judge.

Rhonda S. Price (“Respondent”) appeals from adjudication and disposition orders finding her two sons to be neglected and dependent juveniles. We hold that once the trial court appointed Respondent a Rule 17 guardian ad litem (“GAL”), the hearings should not have proceeded without the GAL being present. The trial court’s orders are vacated and the cases are remanded.

I. Background

The Rutherford County Department of Social Services (“DSS”) filed the petitions in response to Respondent’s report of an incident on 6 May 2014, where the father of both juveniles allegedly threatened to beat H.L.P. “until he was bruised all over with blood running all over him.” Respondent sought assistance, but repeatedly told DSS staff she was unable and unwilling to leave the father and move her children to a safe place. On 7 May 2014, DSS filed petitions alleging Respondent’s two minor children, D.L.P. and H.L.P., were neglected and dependent juveniles and took non-secure custody of D.L.P. and H.L.P.

The pre-adjudication and adjudication hearings occurred on 12 August 2014. Respondent was not present for the hearings. Respondent’s appointed counsel was present and indicated he had “not been advised that well” and that “he will stand mute.” After DSS presented evidence, Respondent’s appointed counsel did not question the witness and the court noted “Mr. Rogers is mute.” The trial court found H.L.P. and D.L.P. to be neglected and dependent juveniles. Due to Respondent’s absence, the court held the disposition hearing open until the next day.

Respondent was present for the disposition hearing the following day. At the outset, Respondent’s appointed counsel notified the court that Respondent had retained counsel and asked the court to release him from his appointment. The trial court agreed to release appointed counsel after the conclusion of the disposition hearing. At this point, Respondent told the court her retained counsel “has every intention of asking for this to be retried or refiled for a readjudication [sic] hearing,

IN RE D.L.P.

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for another hearing.” The trial court indicated Respondent could request a new hearing, but asked Respondent to allow the court to finish the disposition hearing before moving forward with anything else.

During disposition, the court received evidence from DSS and the GAL for both juveniles. Respondent’s appointed attorney did not question, examine or participate. The juveniles’ GAL requested that both Respondent and the juveniles’ father be required to undergo psychological evaluations. At that time Respondent announced she was leaving the courtroom. The court ordered the bailiff to take Respondent into custody and hold her in the courtroom, to which she replied, “[t]hen you can take me to jail . . . I don’t need to be here.” Respondent refused to remain quiet and finally stated, “I am not going to be quiet until you remove me from this courtroom.” Following this exchange, the court ordered the bailiff to remove Respondent from the courtroom.

Because of Respondent’s outburst, a discussion on the record ensued between the court, Respondent’s appointed attorney, Respondent’s husband, and the juveniles’ GAL attorney about possible ways to obtain a mental assessment or treatment for Respondent. Ultimately, the Court ordered Respondent to be held in protective custody until she was assessed by the Mobile Crisis Unit.

The trial court entered its adjudication and disposition orders over three months later on 18 November 2014. Separate, but identical, orders address each juvenile, with each order entitled, “Adjudication and Disposition Order.” In both juveniles’ orders, the Court made the following findings of fact:

9. The Respondent Mother has suffered an organic brain injury requiring brain surgery.

. . . .

12. The Respondent Mother was present during disposition. In open court she exhibited erratic and belligerent behavior. The Court believes these behaviors may be affiliated with her injury as described above.

13. As a result of her harmful behavior the Court had the Respondent Mother taken into protective custody. The Court determined the Respondent Mother required a Rule 17 Guardian Ad Litem, and Allyson Shroyer was appointed as the Respondent Mother’s Rule 17 Substitute GAL. The Respondent Mother was held in custody until she met with the Rutherford County Mobile Crisis Unit.

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The adjudication and disposition orders set forth the permanent plan for D.L.P. and H.L.P., with the stated goal of “reunification with one or both of the respondent parents.”

Both juveniles’ adjudication and disposition orders show that the trial judge appointed a GAL for Respondent at some point prior to the entry of the orders. Neither the record nor the transcript contain findings of fact from the trial court’s inquiry into Respondent’s competency, nor is there any clear indication in the transcript whether the Court appointed a GAL for Respondent during the hearings. At no point during the pre-adjudication, adjudication, or disposition hearings was a GAL present for Respondent. Respondent appeals.

II. Issue

Respondent argues once the trial court appointed her a GAL, it was not permitted to conduct the adjudication and disposition hearings without the presence of Respondent’s GAL.

III. Standard of Review

“A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge’s attention, which raise a substantial question as to whether the litigant is *non compos mentis*.” *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). The decision whether to conduct such an inquiry is firmly within the discretion of the trial court. *In re J.R.W.*, __ N.C. App. __, __, 765 S.E.2d 116, 119 (2014).

IV. Analysis

Respondent argues once the trial court determined Respondent required a GAL, the hearing could not proceed without Respondent’s GAL present. We agree.

“On motion of any party or on the court’s own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17.” N.C. Gen. Stat. § 7B-602(c) (2013). Rule 17 sets forth the procedures for appointment of a GAL for an incompetent person. N.C. Gen. Stat. § 35A-1101 defines “incompetent” as it relates to an adult as one who “lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property” N.C. Gen. Stat. § 35A-1101(7) (2013).

In the adjudication and disposition orders, the trial court stated it had determined Respondent required a GAL and appointed one for

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her. The trial court made this determination “[a]s a result of her harmful behavior” during the disposition hearing. We also note the record is replete with documentation of Respondent’s mental and psychological difficulties apparently related to her “organic brain injury requiring surgery” and inability to make decisions regarding the care of the children or her case plan.

Nothing in the transcript indicates exactly when the trial court appointed Respondent’s GAL. It is clear from the record and transcript that the trial court appointed Respondent’s GAL sometime after the adjudication hearing on 12 August 2014. The adjudication and disposition orders contain language indicating that Respondent’s conduct during the disposition was a key factor in the court’s competency determination.

The adjudication and disposition hearings were held on 12 and 13 August 2014 and the orders were not entered until 18 November 2014. Because the adjudication and disposition orders are the only express evidence in the record of Respondent being appointed a GAL, we must presume the court decided Respondent was incompetent at some point during the hearings and expressly appointed a “Rule 17” GAL due to her incompetence.

This Court in *In re A.S.Y.* sets forth a comprehensive analysis of a GAL’s duties after appointment pursuant to N.C. Gen. Stat. § 7B-602 (2013).

Ultimately, after the appointment of a GAL, “the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.” N.C. Gen. Stat. § 1A-1, Rule 17(e). Thus, Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed. The presence and active participation of a GAL appointed according to the provisions of Rule 17 effectively removes any legal disability of the party that is so represented.

In re A.S.Y., 208 N.C. App. 530, 538, 703 S.E.2d 797, 802 (2010).

The transcript reflects Respondent had not advised her appointed attorney “that well” and that he would and did “stand mute.” The transcript also reflects her court appointed attorney sought to withdraw and be relieved of his duties. There does not appear to be any communication

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between Respondent and her court appointed attorney at the disposition hearing. It appears Respondent's situation is specifically anticipated by Rule 17 and N.C. Gen. Stat. § 7B-602 and is sanctioned by this Court in *In re A.S.Y. Id.*

The trial court determined Respondent could not adequately represent her own interests and appointed a GAL to represent her pursuant to N.C. Gen. Stat. § 7B-602. Conducting the hearing without the presence and participation of the GAL for Respondent was error. *In re A.S.Y.* at 540, 703 S.E.2d at 803. The trial court's orders of adjudication and disposition must be vacated.

When the court determined Respondent was incompetent and appointed a GAL, it should not have allowed the hearing to go forward without Respondent's GAL. The record clearly shows a Rule 17 GAL was appointed, but is unclear as to when. Once Respondent "has been appointed a GAL according to Rule 17, the presence and participation of the GAL is necessary in order for the trial court to 'proceed to final judgement, order or decree against any party so represented.'" *Id.* (citation omitted).

V. Conclusion

We vacate the adjudication and disposition orders and remand this case for further proceedings. The trial court will be in the unique position to receive reports, observe the demeanor of Respondent, and determine whether further competency determinations are necessary. If incompetency remains, a GAL must be present at further proceedings.

The trial court's orders are vacated and the cases are remanded.

VACATED AND REMANDED.

Judges GEER and STROUD concur.

IN RE J.A.U.

[242 N.C. App. 603 (2015)]

IN RE J.A.U., A MINOR JUVENILE

S.A.U., PETITIONER

v.

MICHAEL HORTON, RESPONDENT

No. COA15-135

Filed 18 August 2015

Termination of Parental Rights—jurisdiction—standing—paternal grandmother filing petition

The trial court was without subject matter jurisdiction and an order terminating a father's parental rights was vacated where the petitioner, the paternal grandmother, did not fall within any of the categories enumerated in N.C.G.S. § 7B-1103(a) and therefore lacked standing.

Appeal by respondent from order entered 28 October 2014 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 27 July 2015.

John Benjamin “Jak” Reeves and Anne C. Wright for petitioner-appellee.

Michael E. Casterline for respondent-appellant.

GEER, Judge.

Respondent appeals from an order terminating his parental rights to J.A.U. Because petitioner, J.A.U.'s maternal grandmother, lacked standing to file a petition to terminate respondent's parental rights, we vacate the trial court's order.

Facts

J.A.U. (“Jeffrey”) was born in New York State in 2006 and moved to North Carolina with his mother, “Kayla,” when he was six weeks old.¹ Jeffrey and Kayla lived with petitioner when they first moved to North Carolina. In 2007 or 2008, Kayla took Jeffrey to Virginia, where she attended school. Beginning in around 2009, Kayla and Jeffrey lived with

1. The pseudonyms “Jeffrey” and “Kayla” have been used throughout the opinion to protect the child's privacy and for ease of reading.

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the father of Kayla's second child for about two years. However, Jeffrey had frequent visits with petitioner during the first six years of his life, and petitioner provided financial support for Kayla and Jeffrey.

Kayla had ongoing problems with substance abuse and, on 8 October 2012, she voluntarily placed Jeffrey with a family friend and entered a detox facility. On 6 November 2012, the Wilkes County Department of Social Services ("DSS") obtained nonsecure custody of Jeffrey and placed him in the Ebenezer Gardens Christian Children's Home, a group home. DSS filed a petition on 6 November 2012 alleging that Jeffrey was a dependent juvenile and filed an amended petition on 8 November 2012 alleging that Jeffrey was a neglected and dependent juvenile. The amended petition reiterated the allegations from the first petition and added that Kayla had recently named respondent, who was incarcerated, as Jeffrey's father.

On 17 December 2012, Judge David V. Byrd entered an order adjudicating Jeffrey a neglected and dependent juvenile, continuing Jeffrey's custody with DSS, denying respondent the right to visitation with Jeffrey during his incarceration, and allowing Kayla visitation, subject to certain conditions. On 15 March 2013, Judge Michael D. Duncan entered a review order finding that respondent remained incarcerated and that Kayla had done little towards completing the items on the plan developed by DSS. The review order also found that petitioner was interested in having Jeffrey placed in her home, but that she was physically unable to care for him, given that she was recovering from back surgery. The order continued Jeffrey's legal and physical custody with DSS and gave DSS authority to place Jeffrey with petitioner if it became appropriate.

On 21 May 2013, Jeffrey was placed with petitioner, but remained in the legal and physical custody of DSS. Judge Duncan entered a permanency planning order on 28 June 2013, stating that the court had "seriously considered" a permanent plan of placement with petitioner, but had decided to allow Jeffrey's parents an additional 90 days to demonstrate compliance with the DSS case plan. On 10 October 2013, Judge Duncan entered a new permanency planning order granting legal and physical custody of Jeffrey to petitioner. On 24 March 2014, Judge Jeanie R. Houston entered a permanency planning order that continued Jeffrey's custody with petitioner, relieved DSS of further responsibility, and converted the matter to a civil custody action pursuant to the provisions of Chapter 50 of the North Carolina General Statutes.

On 6 May 2014, petitioner filed a petition to terminate respondent's parental rights to Jeffrey pursuant to N.C. Gen. Stat. § 7B-1111(a)(7)

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(2013) (willful abandonment) and N.C. Gen. Stat. § 7B-1111(a)(3) (willful failure to pay a reasonable portion of the cost of care for the juvenile). Following a hearing conducted on 2 October 2014, the trial court entered an order terminating respondent's parental rights on 28 October 2014. Respondent timely appealed to this Court.

Discussion

Respondent first argues the trial court lacked jurisdiction over the termination of parental rights proceeding because petitioner did not have standing to file a petition to terminate his parental rights to Jeffrey. We agree and find this issue dispositive of respondent's appeal.

"In North Carolina, standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re E.T.S.*, 175 N.C. App. 32, 35, 623 S.E.2d 300, 302 (2005) (internal quotation marks omitted). Standing to initiate a termination of parental rights action is governed by N.C. Gen. Stat. § 7B-1103(a) (2013), which provides:

A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:

- (1) Either parent seeking termination of the right of the other parent.
- (2) Any person who has been judicially appointed as the guardian of the person of the juvenile.
- (3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.
- (4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.
- (5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

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- (6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.
- (7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

In this case, petitioner is not a parent of Jeffrey, a county department of social services, or a guardian ad litem, and she had not filed a petition to adopt Jeffrey at the time she filed a petition to terminate respondent's parental rights. Therefore, the only possible bases for petitioner's standing arise under subsections (a)(2), as a "person who has been judicially appointed as the guardian of the person of the juvenile[.]" or (a)(5), as a "person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion."

As regards N.C. Gen. Stat. § 7B-1103(a)(2), it is undisputed that at the time petitioner filed a petition seeking termination of respondent's parental rights, she had not been "judicially appointed as [Jeffrey's] guardian." The record indicates that the trial court awarded only legal and physical custody of Jeffrey to petitioner, and the termination order specifically finds that "[t]here is no person appointed as guardian of the person of the minor child[.]" Therefore, petitioner did not have standing to seek termination of respondent's parental rights under that subsection.

Petitioner, however, argues that she had standing under N.C. Gen. Stat. § 7B-1103(a)(2) because her status as Jeffrey's custodian was equivalent to that of a legal guardian. We addressed this argument in *In re B.O.*, 199 N.C. App. 600, 681 S.E.2d 854 (2009). In *In re B.O.*, the petitioners contended that their status as custodians granted them the same status as guardians and established their standing to file a termination of parental rights petition. *Id.* at 603, 681 S.E.2d at 857. We rejected that argument, noting that our Juvenile Code recognizes a distinction between "custodian" and "guardian" and that:

[u]nder the [Juvenile] Code, "guardians" clearly have far greater powers over their wards than do "custodians." These terms are not synonymous under the statute, and N.C. Gen. Stat. § 7B-1103 includes no provision granting "custodians" standing to petition for termination of another's parental rights.

Id. at 604, 681 S.E.2d at 857. Therefore, "[w]e [could not] hold that the words 'custody' and 'judicially appointed . . . guardian' as used in N.C.

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Gen. Stat. § 7B-1103 were not intended to have specific, distinct meanings.” *Id.* at 603, 681 S.E.2d at 857.

Petitioner acknowledges the holding of *In re B.O.* but urges us to disregard it, based on the fact that the statutory definition of “custodian” has changed since our decision in that case. When *In re B.O.* was decided, N.C. Gen. Stat. § 7B-101(8) (2009) defined custodian as “[t]he person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.” The legislature amended the statute effective 1 October 2013, and “custodian” is now defined as the “person or agency that has been awarded legal custody of a juvenile by a court.” N.C. Gen. Stat. § 7B-101(8) (2013). The effect of this change was to eliminate the extra-judicial definition of a custodian.

Petitioner appears to contend that the legal status of a custodian is now the same as a guardian, because both may only be appointed by a court. Although custodians and guardians are both designated by a court, petitioner cites no authority for the proposition that the two are now identical, or that *In re B.O.* was overruled by the definitional change, and we have found no indication that the legislature intended to conflate the two terms. Moreover, in both the present case and *In re B.O.*, the petitioner was a court-appointed custodian. We therefore have no reason to revisit our holding in *In re B.O.*, and we hold that petitioner did not have standing as a judicially-appointed guardian to file a termination of parental rights petition.

We also conclude that petitioner did not have standing to file for termination of respondent’s parental rights pursuant to N.C. Gen. Stat. § 7B-1103(a)(5) because she was not a “person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.” Petitioner filed a petition for termination of respondent’s parental rights on 6 May 2014. Therefore the relevant time period was 6 May 2012 to 6 May 2014.

The record shows that (1) Jeffrey lived with Kayla from November 2011 until DSS became involved with the family on 8 October 2012; (2) DSS placed Jeffrey in a group home in November 2012; and (3) DSS did not place Jeffrey with petitioner until 21 May 2013. When petitioner filed the petition for termination of respondent’s parental rights on 6 May 2014, Jeffrey had been living with her for slightly less than a year. By the plain language of the statute, petitioner is not a person “with

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whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.” *Id.*

Petitioner contends that her standing is established in the trial court’s Finding of Fact No. 10, which found that Jeffrey “has resided with Petitioner all of the child’s life with the exception of a few days when the child resided with his biological mother.” Respondent challenges Finding of Fact No. 10 as unsupported by clear, cogent, and convincing evidence, and we agree. Jeffrey may have lived with petitioner at various points in his life. However, the evidence is undisputed that he did not live with petitioner for “all of the child’s life with the exception of a few days[.]” For example, petitioner testified that Kayla and Jeffrey lived in Virginia during 2007 or 2008, and that they lived with the father of Kayla’s other child for about two years, starting when Jeffrey was age three. The record shows he also lived with Kayla between November 2011 and October 2012 and that he was in a group home from November 2012 until 21 May 2013. We conclude that this finding of fact is unsupported by the evidence, which establishes that Jeffrey had lived apart from petitioner for periods significantly longer than “a few days” and had lived with petitioner continuously for less than one year at the time she filed a termination petition. Accordingly, we hold that petitioner did not have standing to file a termination of parental rights petition under N.C. Gen. Stat. § 7B-1103(a)(5).

In urging us to reach a contrary conclusion, petitioner contends that there is evidence that Jeffrey had lived with petitioner for “the majority of his life.” However, petitioner does not argue that Jeffrey had lived with petitioner continuously for at least two years prior to the filing of the petition, which is the statutory standard. Petitioner also cites language in *In re E.T.S.*, describing the two-year requirement set out in N.C. Gen. Stat. § 7B-1103(a)(5) as being “based upon the relationship between the petitioner and the child.” *In re E.T.S.*, 175 N.C. App. at 38, 623 S.E.2d at 303. However, in *In re E.T.S.*, the minor had lived with the petitioner for more than two years. The quoted language, which is arguably *dicta*, does not hold that a long-term relationship is a valid substitute for the requirement of N.C. Gen. Stat. § 7B-1103(a)(5).

Petitioner also cites *In re A.D.N.*, __ N.C. App. __, 752 S.E.2d 201 (2013), *disc. review denied*, 367 N.C. 321, 755 S.E.2d 626 (2014), in which we held that where the juvenile had lived with the petitioner for more than two years, the petitioner’s standing to file a petition for termination of parental rights was not defeated by the fact that during the two-year period the child had visited the respondent parents for a few days on a

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number of occasions. *In re A.D.N.* is factually distinguishable from the present case, in which Jeffrey had not lived with petitioner for at least two years prior to the filing of the termination petition.

In conclusion, petitioner does not fall within any of the categories enumerated in N.C. Gen. Stat. § 7B-1103(a), and she therefore lacked standing to file a petition to terminate respondent's parental rights. Because she lacked standing, the trial court did not have subject matter jurisdiction over the termination proceedings. Accordingly, we must vacate the trial court's order terminating respondent's parental rights. Because we are vacating the trial court's order, we need not address respondent's remaining arguments on appeal.

VACATED.

Judges STROUD and TYSON concur.

LEIGH BOWMAN MALINAK, PLAINTIFF

v.

PAVOL MALINAK, DEFENDANT

No. COA14-1354

Filed 18 August 2015

Child Custody, Support and Visitation—support—overdue payments—laches not a defense

Laches was not an applicable defense to the non-payment of court-ordered child support obligations.

Appeal by plaintiff from order entered 7 August 2014 by Judge Deborah Brown in Alexander County District Court. Heard in the Court of Appeals 21 May 2015.

Wesley E. Starnes for plaintiff-appellant.

W. Wallace Respess, Jr., for defendant-appellee.

McCULLOUGH, Judge.

Leigh Bowman Malinak ("plaintiff") appeals from a contempt order holding Pavol Malinak ("defendant") in willful civil contempt and

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holding defendant owes \$6,800.00 in back child support. For the following reasons, we reverse and remand.

I. Background

Plaintiff and defendant were married 22 June 1996, had one child together during their marriage on 6 November 1996, and separated with the intent to remain permanently separated on 4 February 1999. On 26 January 2000, plaintiff filed a complaint in Alexander County District Court seeking custody of and support for the child. Pursuant to a consent order filed 31 March 2000, plaintiff was granted primary custody and defendant was ordered to pay \$400.00 per month in child support.

On 18 April 2000, defendant filed an answer and counterclaims seeking child custody, child support, attorney's fees, and absolute divorce. Plaintiff replied to defendant's counterclaims and joined defendant's request for absolute divorce on 28 June 2000. The same day plaintiff filed her reply, the trial court filed a judgment granting absolute divorce. All other matters were severed and reserved for future determination.

More than a decade later on 1 April 2014, plaintiff filed a motion to show cause based on defendant's alleged failure to make child support payments. Specifically, plaintiff alleged defendant owed \$48,000.00. After several continuances, defendant filed a pleading on 23 July 2014 asserting the affirmative defenses of laches, the statute of limitations, and unclean hands.

Following a hearing on plaintiff's motion to show cause in Alexander County District Court, the Honorable Deborah Brown announced her decision to hold defendant "in contempt of the prior court order in that he is in arrears on his child support in the amount of six thousand, eight hundred dollars." The trial judge explained her reasoning and calculations in open court and later memorialized her decision in a written order of contempt filed 7 August 2014. The following findings of fact in the order of contempt explain her ruling:

6. The parties entered into a Consent Judgment on March 31, 2000, which provides for among other things for the payment of child support in the amount of \$400.00 per month.
7. The Defendant paid child support until May 2001.
8. The Plaintiff discouraged the Defendant from visiting with the minor child and represented to the Defendant

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that she would not enforce the child support order if he would not visit.

9. The lack of visitation does not excuse the payment of child support.

....

13. The Defendant began paying child support again in October in 2012, and has paid child support consistently since that time.

....

15. The Plaintiff has waited 13 years to attempt to enforce the consent order of March 31, 2000. The Plaintiff is barred by the doctrine [sic] of Laches from seeking child support prior to March 26, 2011.

16. The Plaintiff testified that she did not pursue the child support as she did not have monies with which to do so. She did however obtain Medicaid through the Department of Social Services and could have pursued child support.

17. From March 26, 2011, through July 2014, the Defendant should have paid \$14,400.00 in child support. The Defendant has paid \$7,600.00 leaving a balance of \$6,800.00.

18. The Defendant's failure to pay was wilful [sic] and without lawful justification or excuse.

19. The purposes for which the order was entered can still be served by its' enforcement.

Plaintiff filed notice of appeal from the order of contempt on 4 September 2014.

II. Discussion

The sole issue raised on appeal by plaintiff is whether the trial court erred by barring the recovery of unpaid child support prior to 26 March 2011 under the doctrine of laches. The doctrine of laches is an affirmative defense which the pleading party bears the burden of proving. *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976).

To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay

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of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001). The applicability of the doctrine of laches in child support cases is a question of law. “We review questions of law *de novo*.” *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

In the present case, plaintiff concedes recovery of unpaid child support accruing prior to 1 April 2004 is barred by the ten year statute of limitations provided in N.C. Gen. Stat. § 1-47, *see State of Michigan v. Pruitt*, 94 N.C. App. 713, 714, 380 S.E.2d 809, 810 (1989), but contends the trial court erred in applying the doctrine of laches to bar recovery of child support owed from 1 April 2004 until 26 March 2011, “thereby denying plaintiff \$33,600.00 in accrued child support that was owing during the relevant period of the statute of limitations.” Plaintiff cites *Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (1989), and *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981), in support of her argument. Upon review, we agree the trial court erred in applying the doctrine of laches to limit plaintiff’s recovery of past due child support.

In *Larsen*, fourteen years after a divorce decree was entered ordering the plaintiff’s former husband to pay child support, the plaintiff filed suit against her former husband’s estate seeking to collect \$10,710.00 in past due child support. 54 N.C. App. at 166-67, 282 S.E.2d at 552. Despite the estate’s assertion of laches as a bar to the plaintiff’s recovery, the trial court entered summary judgment awarding the plaintiff child support owed during the applicable ten year statute of limitations period prior to the date of the plaintiff’s former husband’s death. *Id.* at 167, 282 S.E.2d at 552. On appeal, this Court affirmed the trial court’s entry of summary judgment in favor of the plaintiff, distinguishing the case from prior cases that recognized the doctrine of laches as a valid defense on the basis that those prior cases did not involve claims of past due court-ordered payments, such as the continuing obligation of court-ordered child support. *Id.* at 167-68, 282 S.E.2d at 552-53. Furthermore, in *Larsen*

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this Court acknowledged prior cases in which this State's appellate courts have held the defense of laches was untenable in suits to recover past due support obligations, *see Nall v. Nall*, 229 N.C. 598, 50 S.E.2d 737 (1948), and *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977), and ultimately held, "[t]he only bar to [the] plaintiff's action for enforcement of the child support judgment is the applicable ten-year statute of limitations[.]" *Larsen*, 54 N.C. App. at 169, 282 S.E.2d at 553.

Years later in *Napowsa*, this Court addressed a defendant's argument that "the trial court erroneously denied his motion to dismiss on the ground that laches barred [the] plaintiff from recovering past child support since the action was not filed until the child was seventeen years of age." 95 N.C. App. at 22, 381 S.E.2d at 887. Relying in part on *Larsen*, this Court expressed that it "believe[d] the doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the . . . statute of limitations" and stated it was "aware of no decision of this State which has accepted laches as a defense to the enforcement of a court order for child support." *Id.* at 22, 381 S.E.2d at 887. Thus, in *Napowsa* this Court held "the trial court properly refused to dismiss [the] plaintiff's action based on the defense of laches." *Id.* at 23, 381 S.E.2d at 887.

In his brief on appeal, defendant acknowledges the holdings of *Larsen* and *Napowsa* and "concedes that generally speaking our Courts have not embraced the equitable defense of laches barring claims for unpaid alimony and child support." Defendant, however, argues there are exceptions for the application of equitable defenses to the payment of child support and requests that we carve out a rule. Defendant cites *Ribelin v. Creel*, No. COA 14-643, 2015 WL 660788 (N.C. App. Feb. 17, 2015), a recent unpublished opinion by this Court, and *Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000), in support of his argument. We decline defendant's request as both *Ribelin* and *Tepper* are not controlling in this case.

Although *Ribelin* is unpublished, defendant "submits that it is so recent having been handed down on February 17, 2015, that it has some precedential value." We are not persuaded. First, nothing in Rule 30(e) of the North Carolina Rules of Appellate procedure provides that an unpublished opinion has precedential value merely because it is recent. Second, *Ribelin* is easily distinguished from the present case because the defendant in *Ribelin* was not under a prior court order to pay child support. 2015 WL 660788, at *4. Thus, this Court held in *Ribelin* that it

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was within the trial court's discretion to limit the amount of child support retroactively ordered in an order imposing a child support obligation on the defendant for the first time. *Id.* In contrast, defendant in the present case failed to make child support payments subsequent entry of the trial court's order requiring him to do so. We hold laches is not applicable in such a situation to avoid a court-ordered obligation.

Regarding *Tepper*, while this Court upheld the trial court's application of laches to bar the plaintiff's recovery of past due child support, it did so applying laches as construed by the Illinois courts. 140 N.C. App. at 361-62, 536 S.E.2d at 659-60. Its decision was not based on the applicability of laches under North Carolina law and, therefore, the opinion is not controlling in the present case.

III. Conclusion

For the reasons discussed, laches is not an applicable defense to the non-payment of court ordered child support obligations and, therefore, the trial court erred in limiting the arrears owed by defendant in this case.

REVERSED AND REMANDED.

Judges STROUD and INMAN concur.

SHEILA ROBINSON, PETITIONER

v.

UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM, RESPONDENT

No. COA14-1194

Filed 18 August 2015

1. Public Officers and Employees—State employee—work rules

The work rules under which a UNC Health System employee were dismissed were applicable to her even though she had achieved career State employee status before the applicable date in N.C.G.S. § 116-37, which she contended meant that she was not subject to rules adopted after that date. The provisions in question were “written work rules”; there was no dispute that they were known to petitioner; and “written work rules” of this type were authorized by N.C.G.S. § 116-37(d)(2) as of 31 October 1998, and that had not changed.

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2. Civil Rights—complaints to employer—no notice of protected class factors—discharge not retaliation

Petitioner was not terminated in retaliation for her complaints to her employer, in violation of 42 U.S.C. § 2000e, where petitioner failed to put respondent on notice of any relevant factors concerning a protected class, so that respondent had no knowledge that petitioner was engaged in a protected activity and could not have engaged in retaliation.

3. Public Officers and Employees—wrongful termination—burden of proof

The agency and trial court did not err in placing the burden of proof upon petitioner where petitioner was terminated from the UNC Health Care System for her conduct. Despite statutory changes, petitioner failed to demonstrate that the burden of proof applicable to her case changed, so it remained on the employee who was challenging just cause for termination. Also, the result would have been the same even if the burden of proof had been upon respondent, since petitioner did not deny that she behaved in the manner alleged by respondent and did not challenge any of the findings of fact as unsupported by substantial evidence.

4. Public Officers and Employees—termination of employment—unacceptable personal conduct

The trial court did not err by concluding that respondent had just cause to terminate petitioner's employment. Petitioner had the burden of proving that her conduct was not unacceptable personal conduct as defined in the statute, but she did not deny that she had behaved in the manner respondent alleged and did not allege that any of the findings of fact were unsupported by the evidence.

Appeal by petitioner from order entered 18 July 2014 by Judge G. Bryan Collins, Jr., in Durham County Superior Court. Heard in the Court of Appeals 8 April 2015.

Merritt, Webb, Wilson & Caruso, PLLC, by Joy Rhyne Webb, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kathryn J. Thomas, for respondent-appellee.

STROUD, Judge.

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Where just cause existed to terminate petitioner's employment, the trial court did not err in upholding the Final Agency Decision affirming her termination. Where petitioner did not allege discrimination based upon a protected class, petitioner's workplace complaints were not protected conduct. Where rules implemented after 1998 do not apply to petitioner, a statute effective after 1998 shifting the burden of proof to respondent did not apply to petitioner.

I. Factual and Procedural Background

Sheila Robinson (petitioner) began her employment with UNC Hospitals in May 1992, in the Patient Account Services Department. She was employed with UNC Hospitals, which became part of the University of North Carolina Health Care System (respondent) as of 1 November 1998, continuously from May 1992 until 20 November 2012, at which point her employment was terminated. Petitioner had achieved career State employee status, as defined by N.C. Gen. Stat. § 126-1.1, by 31 October 1998. In January 2001, petitioner was transferred to the Accounts Payable Department, in the position of Accounts Payable Technician, and remained there until her employment was terminated in 2012.

On 6 December 2012, petitioner filed a grievance challenging her termination. Following a meeting concerning petitioner's grievance, petitioner received a written response on 4 January 2013, in which the vice president and CFO of UNC Hospitals upheld the decision to terminate petitioner's employment. Petitioner appealed this decision, which was investigated and reviewed by an administrative panel. The panel recommended that petitioner's termination be upheld, and the panel's recommendation was followed. Petitioner was notified of this decision by letter dated 8 April 2013.

Petitioner sought a further administrative hearing of the issue on 16 April 2013. The hearing was held on 17 September 2013. On 30 September 2013, the panel issued its recommendation that petitioner's termination be upheld and her requested relief be denied. The President of UNC Hospitals accepted the panel's recommendation in its entirety, upheld petitioner's termination, and denied her requested relief. The Final Agency Decision containing this determination was issued and served on 25 October 2013.

On 22 November 2013, petitioner filed a petition for judicial review in Durham County Superior Court. On 27 November 2013, respondent filed a response to the petition for judicial review. On 14 July 2014, the trial court heard arguments on the petition.

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Tammy Stone (Stone), who became petitioner's supervisor in January 2012, testified that petitioner's termination was based upon personal conduct, including a significant past record of unfounded allegations and complaints about co-workers and managers in violation of respondent's Code of Conduct, explosive behavior in department meetings, argumentative and disrespectful interactions with supervisors, and repeated and unsupported claims that she was being singled out or treated differently. The dismissal notice that petitioner received stated that petitioner's discharge was based on her personal conduct, specifically: (1) she alleged that policies were not being applied equally to her on multiple occasions; (2) she alleged that she alone was being held to respondent's Time and Attendance policy on multiple occasions; (3) she alleged that other Accounts Payable staff were receiving preferential treatment; (4) she alleged discrimination; (5) she alleged harassment and intimidation by Stone; (6) she alleged ostracism from her coworkers; (7) she alleged that she was unfairly given a greater workload on multiple occasions; (8) she alleged that she was not receiving proportionate assistance from the department volunteer on multiple occasions; (9) she alleged that employees with children or dependents were receiving unfair benefits with regard to respondent's "Notification Less than 24 Hours in Advance" policy. Stone acknowledged that petitioner performed her job adequately, and that job performance did not play a part in her termination.

On 18 July 2014, it entered its order, affirming the Final Agency Decision.

Petitioner appeals.

II. Standard of Review

Where the petitioner alleges that the agency decision was either unsupported by the evidence, or arbitrary and capricious, the [reviewing] court applies the 'whole record test' to determine whether the agency decision was supported by substantial evidence contained in the entire record. Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.

Campbell v. N.C. Dep't of Transp., Div. of Motor Vehicles, 155 N.C. App. 652, 657, 575 S.E.2d 54, 58 (2003) (quoting *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 3-4, 541 S.E.2d 750, 752, *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001)).

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III. Final Agency Decision

[1] Petitioner first contends that the trial court erred in concluding that the Final Agency Decision was not erroneous because the UNC Health Care Code of Conduct which was adopted after 31 October 1998 does not apply to her. We disagree.

Petitioner contends that, as a career State employee, and having achieved that status prior to 31 October 1998, petitioner was not subject to “rules regarding discipline or discharge adopted after 31 October 1998.” Petitioner relies upon N.C. Gen. Stat. § 116-37, which states that “an employee who has achieved career State employee status as defined by G.S. 126-1.1 by October 31, 1998, shall be subject to the rules regarding discipline or discharge that were effective on October 31, 1998, and shall not be subject to the rules regarding discipline or discharge adopted after October 31, 1998.” N.C. Gen. Stat. § 116-37(d)(2) (2013). Petitioner contends that she was terminated pursuant to respondent’s Code of Conduct policy, which allowed respondent to terminate an employee without prior written counseling or warning. She contends, however, that because this policy was adopted after 31 October 1998, it did not apply to her.

Respondent argues that the Code of Conduct policy is not a “rule regarding discipline or discharge” which was not subject to change after 31 October 1998, but is simply an “administrative policy governing working conditions and behavioral expectations for employees[.]” In fact, the very same subsection of N.C. Gen. Stat. § 116-37(d) upon which petitioner relies includes other provisions, which make the distinction between written work rules and “rules regarding discipline or discharge.” The entire subsection is as follows:

(2) The board of directors may adopt or provide for rules and regulations concerning, but not limited to, annual leave, sick leave, special leave with full pay or partial pay supplementing workers’ compensation payments for employees injured in accidents arising out of and in the course of employment, working conditions, service awards and incentive award programs, grounds for dismissal, demotion, or discipline, other personnel policies, and any other measures that promote the hiring and retention of capable, diligent, and effective career employees. However, an employee who has achieved career State employee status as defined by G.S. 126-1.1 by October 31, 1998, shall not have his or her compensation reduced

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as a result of this subdivision. Further, an employee who has achieved career State employee status as defined by G.S. 126-1.1 by October 31, 1998, shall be subject to the rules regarding discipline or discharge that were effective on October 31, 1998, and shall not be subject to the rules regarding discipline or discharge adopted after October 31, 1998.

N.C. Gen. Stat. § 116-37(d)(2).

Petitioner's argument is essentially that the legislation which created the UNC Health Care System and established its governance including authorization to "adopt or provide for rules and regulations" regarding employment did not allow the Board of Directors to adopt any new rules governing behavior of employees in the workplace if a violation of one of those rules could ultimately lead to dismissal or discharge. Thus, the UNC Code of Conduct, as adopted initially or as amended over the years, could never apply to any employee who had achieved career State employee status by 31 October 1998. We disagree.

Under N.C. Gen. Stat. § 116-37, the Board of Directors of the UNC Health System had the authority to adopt written work rules including "grounds for dismissal, demotion, or discipline, other personnel policies, and any other measures that promote the hiring and retention of capable, diligent, and effective career employees." The Code of Conduct provisions in question are the type of rules which are allowed under N.C. Gen. Stat. § 116-37(d)(2). Respondent correctly notes that petitioner's argument would lead to the "absurd result" that her work rules and job description and duties would have been frozen in place as of 1998.

In addition, N.C. Gen. Stat. § 126-35 provides that a career State employee under Chapter 126 of the North Carolina General Statutes may be terminated for "just cause." N.C. Gen. Stat. § 126-35(a) (2013). This provision was made effective by the legislature in 1990, and was therefore a rule in place "effective on October 31, 1998[.]" See 1989 N.C. Sess. Laws, c. 1025, § 2 (eff. 1990). "Just cause" may be based upon unsatisfactory job performance or unacceptable personal conduct; the North Carolina Administrative Code defines "unacceptable personal conduct" as:

(d) the willful violation of known or written work rules;
[or]

(e) conduct unbecoming a state employee that is detrimental to state service;

25 N.C. Admin. Code 1J.0604(b), .0614(8) (2015).

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The provisions of the Code of Conduct in question are “written work rules” and there is no dispute that they were also known to petitioner. As noted above, “written work rules” of this type are authorized by N.C. Gen. Stat. § 116-37(d)(2), and this authorization existed as of 31 October 1998 and has not changed. The order notes that the provisions petitioner had violated were the following:

3. Inappropriate or disruptive behavior defined by the policy includes: inappropriate words that are disrespectful, insulting, demeaning or abusive; making demeaning comments or intimidating remarks; having inappropriate arguments with staff; making negative comments about other health care team members; having outbursts of anger; acting in a manner that others would describe as bullying.

4. Inappropriate or disruptive behavior defined by the policy includes: inappropriate actions/inactions that includes refusing to comply with known and generally accepted practice standards such that the refusal inhibits staff from delivering quality care; failing to work collaboratively or cooperatively with others; creating rigid or inflexible barriers for requests for assistance/cooperation.

Petitioner does not challenge the specific findings of fact as to the instances of her behavior, which are obviously in violation of these policies. Because petitioner’s conduct fell within the definition of unacceptable personal conduct, we hold that the reviewing agency did not err in concluding that there was just cause to terminate petitioner, and the trial court did not err in relying upon the Final Agency Decision.

Petitioner further contends that, as a career State employee, she possessed a constitutionally-protected property interest in her continued employment, which could not be taken from her absent proper application of law. However, her argument that her dismissal was in violation of law is based upon the same contention as her first argument, that the Code of Conduct was not applicable to her and thus we reach the same result. For the reasons stated above, proper legal procedure was followed in petitioner’s termination.

[2] Petitioner also contends that her complaints about her treatment were constitutionally protected statements concerning her unfair treatment, and thus did not constitute a proper basis for the Final Agency Decision. She contends that termination for her complaints constituted retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

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§ 2000e. However, petitioner presented no evidence that her complaints concerned any protected status, such as age, race, or sex discrimination, nor does she make such an argument to this Court.

Other courts have held that a mere complaint of harassment or discrimination in general, without any connection to a protected class, is insufficient to establish protected activity. *Bonds v. Leavitt*, 629 F.3d 369, 384 (4th Cir. 2011); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). In *Dowe*, the Fourth Circuit held that “the employer’s knowledge that the plaintiff engaged in a protected activity is absolutely necessary” to establish a claim of retaliation, and that “an employer cannot take action because of a factor of which it is unaware[.]” *Dowe*, 145 F.3d at 657. In the instant case, petitioner failed to put respondent on notice of any relevant factors concerning a protected class; as a result, respondent had no knowledge that petitioner was engaged in a protected activity, and could not have engaged in retaliation. We hold that, as petitioner failed to raise the issue of discrimination based upon a protected class, petitioner’s conduct in her complaints was not protected, and respondent’s termination based upon those complaints was not retaliation.

This argument is without merit.

IV. Burden of Proof

[3] Petitioner next contends that the agency and trial court erred in placing the burden of proof upon her, rather than upon respondent.

In 1998, an employee terminated for just cause pursuant to N.C. Gen. Stat. § 126-35 had the burden of proof in an action contesting the validity of that termination. *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). In *Peace*, our Supreme Court observed that neither state nor federal constitution, nor statute, had explicitly placed the burden of proof in employment termination cases on either party; it held that, “[i]n the absence of state constitutional or statutory direction, the appropriate burden of proof must be judicially allocated on considerations of policy, fairness and common sense.” *Id.* (citations and quotations omitted). Relying on the general principle that the burden is on the party asserting a claim to show the existence of that claim, the Court held that this placed the burden of proof upon the petitioner. *Id.*

Petitioner notes, however, that in 2001, N.C. Gen. Stat. § 126-35 was amended, providing that “[i]n contested cases conducted pursuant to Chapter 150B of the General Statutes, the burden of showing that a career

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State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.” N.C. Gen. Stat. § 126-35(d) (2013); 2000 N.C. Sess. Laws, c. 190, § 13 (eff. 2001). This statute has since been repealed, *see* 2013 N.C. Sess. Laws, c. 382, §6.1, and similar provisions can be found in N.C. Gen. Stat. § 126-34.02(d) (2013). But this statute, in its current form, is contained within Article 8 of Chapter 126 of the North Carolina General Statutes and does not apply to this case.

N.C. Gen. Stat. § 116-37(d), in addition to the provisions quoted above, provides in pertinent part as follows:

(d) Personnel. – Employees of the University of North Carolina Health Care System shall be deemed to be employees of the State and shall be subject to all provisions of State law relevant thereto; provided, *however, that except as to the provisions of Articles 5, 6, 7, and 14 of Chapter 126 of the General Statutes, the provisions of Chapter 126 shall not apply to employees of the University of North Carolina Health Care System*, and the policies and procedures governing the terms and conditions of employment of such employees shall be adopted by the board of directors; provided, that with respect to such employees as may be members of the faculty of the University of North Carolina at Chapel Hill, no such policies and procedures may be inconsistent with policies established by, or adopted pursuant to delegation from, the Board of Governors of The University of North Carolina.

N.C. Gen. Stat. § 116-37(d) (emphasis added).

Only four specific Articles of Chapter 126 are applicable to employees of the University of North Carolina Health System, and Chapter 8 is not one of them. Petitioner has failed to demonstrate that the burden of proof applicable to her case has changed, so it remains on the employee who is challenging just cause for termination, as held by our Supreme Court in *Peace*. We also note that the result would have been the same even if the burden of proof had been upon respondent, since petitioner did not deny that she behaved in the manner alleged by respondent and she has not challenged any of the findings of fact as unsupported by substantial evidence. Petitioner’s claim is simply that she was entitled to behave as she did, essentially as a matter of law; the Hearing panel, the president of UNC Hospitals, the superior court, and this Court all disagree.

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We hold therefore that the agency and trial court did not err in placing the burden of proof upon petitioner.

This argument is without merit.

V. Termination of Employment

[4] Lastly, petitioner contends that the trial court erred in concluding that respondent had just cause to terminate her employment. We disagree.

Petitioner contends that respondent lacked just cause to terminate her employment, because her actions did not fall within the definition of unacceptable personal conduct. The North Carolina Administrative Code defines unacceptable personal conduct as:

- (a) conduct for which no reasonable person should expect to receive prior warning;
- (b) job-related conduct which constitutes a violation of state or federal law;
- (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
- (d) the willful violation of known or written work rules;
- (e) conduct unbecoming a state employee that is detrimental to state service;
- (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
- (g) absence from work after all authorized leave credits and benefits have been exhausted; or
- (h) falsification of a state application or in other employment documentation.

N.C. Admin. Code 1J.0614(8).

Respondent contended that petitioner's conduct violated its Code of Conduct, and that doing so was prohibited disruptive behavior. As stated above, petitioner had the burden of proving that her conduct was not unacceptable personal conduct as defined in the statute. Petitioner did not deny that she had behaved in the manner respondent alleged.

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She has not alleged on appeal that any of the facts below were unsupported by the evidence. Petitioner did not meet her burden at trial and has not done so upon appellate review. We hold, therefore, that the trial court did not err in upholding the Final Agency Decision's conclusion that respondent had just cause to terminate petitioner's employment.

AFFIRMED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
SAMEER IBN MUHAMMOD EDGAR

No. COA14-987

Filed 18 August 2015

1. Sentencing—prior record level—stipulation—questions of fact

On appeal from defendant's guilty plea to two counts of attempted first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the Court of Appeals dismissed defendant's argument that the trial court erred in sentencing him as a prior record level II offender. Defendant's stipulation that he had a prior out-of-state conviction and that the conviction was a felony in Michigan were questions of fact, not law. It would have been defendant's burden to demonstrate to the trial court that this prior conviction should be treated as a misdemeanor because of its substantial similarity with North Carolina's misdemeanor offense of carrying a concealed weapon.

2. Constitutional Law—effective assistance of counsel—direct appeal

On appeal from defendant's guilty plea to two counts of attempted first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the Court of Appeals dismissed without prejudice defendant's argument that his trial counsel rendered ineffective assistance by failing to present any evidence of the similarity between his out-of-state prior conviction and the corresponding North Carolina offense.

STATE v. EDGAR

[242 N.C. App. 624 (2015)]

Appeal by defendant from judgment entered 10 April 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 19 February 2015.

Roy Cooper, Attorney General, by James C. Holloway, Assistant Attorney General, for the State.

Anna S. Lucas for defendant-appellant.

DAVIS, Judge.

Sameer Ibn Muhammod Edgar (“Defendant”) appeals from the judgment entered on his plea of guilty to two counts of attempted first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWIKISI”), and twenty-four counts of discharging a firearm into occupied property. On appeal, he contends that (1) the trial court erred in sentencing him as a prior record level II offender because its calculation of his prior record level was premised on a legally ineffective stipulation; and (2) he received ineffective assistance of counsel when his attorney at trial failed to present evidence demonstrating that his prior out-of-state conviction was substantially similar to a misdemeanor offense in North Carolina. After careful review, we dismiss Defendant’s appeal.

Factual Background

On 5 September 2012, Defendant, his brother Kumani Regains (“Regains”), and an individual identified as Mr. Height (“Height”) traveled from Kinston, North Carolina to Raleigh, North Carolina to see Defendant’s and Regains’ other brother, who had just been robbed by a man named Lamont Jones (“Jones”) in a “drug deal gone bad.” Defendant, Regains, and Height then drove back towards Kinston, stopping in Smithfield, North Carolina at approximately 8:00 p.m. They drove to an apartment complex on Towbridge Street in Smithfield, exited the vehicle, and approached apartment 38, the apartment where Jones lived. They knocked on the window of the apartment, calling out Jones’ name, and a voice from inside the apartment replied that Jones “was not there.”

Defendant, Regains, and an unnamed co-defendant¹ — each armed with a handgun — began firing shots into apartment 38. They then left

1. It is unclear from the record whether this unnamed co-defendant traveled with the others from Kinston or joined them at some other point.

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the apartment complex and returned to Kinston. Several of the shots fired into the apartment struck two of the inhabitants, a 23-year-old woman and her 8-year-old son. The woman suffered a gunshot wound to her neck, and her son was rendered paralyzed from the waist down as a result of the gunshot wound he sustained to his spinal column.

On 3 December 2012, a grand jury returned bills of indictment charging Defendant with two counts of attempted first-degree murder, two counts of AWDWIKISI, and twenty-four counts of discharging a firearm into occupied property. Defendant pled guilty to all charges on 7 April 2014 pursuant to a plea agreement stating that he would “receive an active sentence of 180 to 228 months.” The trial court entered judgment on his guilty plea, sentencing him as a prior record level II offender to 180 to 228 months imprisonment.

Analysis**I. Prior Record Level**

[1] Defendant’s primary argument on appeal is that the trial court erred in calculating his prior record level because it based its calculation on an ineffective stipulation. Defendant’s sole conviction prior to the present offenses was a conviction in Michigan for carrying a concealed weapon, which he contends is substantially similar to the North Carolina offense of carrying a concealed weapon (a Class 2 misdemeanor for first-time offenders). For this reason, Defendant argues that he should have been assigned zero prior record level points and, therefore, been classified as a prior record level I offender.

“The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender’s prior convictions that the court . . . finds to have been proven in accordance with this section.” N.C. Gen. Stat. § 15A-1340.14(a) (2013). Pursuant to N.C. Gen. Stat. § 15A-1340.14, Class A felony convictions are assigned ten points, Class B1 felony convictions are assigned nine points, Class B2, C, and D felony convictions are assigned six points, Class E, F, and G felony convictions are assigned four points, and Class H and I felony convictions are assigned two points. N.C. Gen. Stat. § 15A-1340.14(b)(1)-(4). Class A1 — and some Class 1 — misdemeanor convictions are assigned one point while all other misdemeanor convictions are assigned zero points. N.C. Gen. Stat. § 15A-1340.14(b)(5).

Where a defendant’s prior conviction or convictions occurred outside of North Carolina, the following rules apply:

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[A] conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e).

N.C. Gen. Stat. § 15A-1340.14(f) permits various methods of proving the existence of a prior conviction, including the “[s]tipulation of the parties.” The court then calculates the defendant’s prior record level based on its determination of his prior convictions and addition of the applicable points stemming from these prior convictions. Prior record levels span from level I (which encompasses offenders with zero to one points) to level VI (which requires at least eighteen points). N.C. Gen. Stat. § 15A-1340.14(c).

Pursuant to N.C. Gen. Stat. § 15A-1444(a2), a defendant who pleads guilty to a criminal offense in superior court is entitled to an appeal as a matter of right as to the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant’s prior record level under G.S. 15A-1340.14 or the defendant’s prior conviction level under G.S. 15A- 1340.21;

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(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2)(1)-(3) (2013) (emphasis added).

Our Court has previously explained, however, that while “[a] plain reading of this subsection indicates that the issues set out may be raised on appeal by *any* defendant who has pled guilty to a felony or misdemeanor in superior court[,] . . . the right to appeal granted by this subsection is not without limitation.” *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998). In *Hamby*, this Court specifically held that dismissal of the defendant's appeal was appropriate because she had stipulated during her plea negotiations to each of the matters addressed in N.C. Gen. Stat. § 15A-1444(a2), thereby mooting the issues she could have raised on appeal. *Id.* at 369-70, 499 S.E.2d at 197.

In her plea agreement, defendant admitted that her prior record level was II, that punishment for the offense could be either intermediate or active in the trial court's discretion and that the trial court was authorized to sentence her to a maximum of forty-four months in prison. By these admissions, defendant mooted the issues of whether her prior record level was correctly determined, whether the type of sentence disposition was authorized and whether the duration of her prison sentence was authorized. Therefore, defendant could not have raised any of the issues enumerated in N.C. Gen. Stat. § 15A-1444(a2) . . . in her appeal. Because defendant could not have raised those issues, she had no right to appeal in this case.

Id.

In the context of prior record level determinations, however, we have recently clarified that when the defendant's stipulation involves a question of *law*, the stipulation does not moot the issue of whether the prior record level was properly calculated. See *State v. Gardner*, ___ N.C. App. ___, ___, 736 S.E.2d 826, 830 (2013) (“A defendant's prior

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convictions can be proved, *inter alia*, by stipulation of the parties. While such convictions often effectively constitute a prior record level, a defendant is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating that level.” (internal citation omitted)). This is so because “[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.” *Id.* at ___, 736 S.E.2d. at 831 (citation and quotation marks omitted).

In *State v. Burgess*, 216 N.C. App. 54, 715 S.E.2d 867 (2011), the defendant pled no contest pursuant to a plea agreement “that upon the defendant’s pleas of no contest to 2nd degree kidnapping and crime against nature, the charges will be consolidated and defendant sentenced in [the] mitigated range of 36 months to 53 months (as a record level 4).” *Id.* at 54-55, 715 S.E.2d at 868 (quotation marks, brackets, and emphasis omitted). On appeal, he argued that the trial court erred in sentencing him as a prior record level IV offender based on several out-of-state convictions because the state failed to present sufficient evidence that these convictions were substantially similar to North Carolina offenses. *Id.* at 57, 715 S.E.2d at 870. We agreed and rejected the state’s contention that the defendant was barred from raising any arguments concerning his prior record level because he had stipulated to it in his plea agreement. *Id.* at 58-59, 715 S.E.2d at 871.

[T]he State’s reliance on *State v. Hamby* for its contention that defendant cannot raise issues related to his sentence on appeal because he stipulated to his prior record level and agreed to his sentence in his plea agreement is misplaced. This Court has repeatedly held a defendant’s stipulation to the substantial similarity of offenses from another jurisdiction is ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law.

Id. (internal citations omitted).

Here, however, Defendant’s stipulation to his prior record level did not implicate any conclusions or questions of law. While *Burgess* is consistent with the well-established principle that a stipulation as to whether an out-of-state conviction is substantially similar to a North Carolina offense is legally ineffective because it implicates a question of law that the trial court is responsible for resolving, *id.* at 59, 715 S.E.2d at 871, in the present case, Defendant did not make any stipulation as to the similarity of his Michigan offense to a North Carolina offense. Instead,

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Defendant's prior conviction was classified as a Class I felony — the default classification for an out-of-state conviction “if the jurisdiction in which the offense occurred classifies the offense as a felony.” N.C. Gen. Stat. § 15A-1340.14(e); *see also State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009) (“According to the statute, the default classification for out-of-state felony convictions is Class I.” (internal quotation marks omitted)). Indeed, our Court has expressly held that

while a trial court may not accept a stipulation to the effect that a particular out-of-state conviction is “substantially similar” to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

State v. Bohler, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010).

Here, Defendant's stipulation in the prior record level worksheet that (1) he had been convicted of carrying a concealed weapon in Michigan; and (2) this offense is classified as a felony in Michigan,² was sufficient to support the default classification of the offense as a Class I felony. *See id.* at 636, 681 S.E.2d at 805 (rejecting contention that defendant's stipulation was invalid and explaining that “[t]he fundamental flaw in Defendant's argument is his assumption that stipulations between the State and a criminal defendant as to the fact of an out-of-state conviction for either a felony or a misdemeanor and stipulations as to the ‘substantial similarity’ between an out-of-state offense and a North Carolina crime are equally ineffective. Such an argument . . . lacks support in our sentencing jurisprudence”).

Accordingly, Defendant's stipulation as to his prior record level and his agreement to the sentence imposed in his plea arrangement were effective and binding. It would have been Defendant's burden to demonstrate to the trial court that his prior out-of-state felony conviction should be treated as a misdemeanor because the conviction was substantially similar to North Carolina's misdemeanor offense of carrying a concealed weapon. *See* N.C. Gen. Stat. § 15A-1340.14(e) (“If the offender proves by the preponderance of the evidence that an offense classified

2. Michigan's penal code classifies the offense of carrying a concealed weapon as “a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than \$2,500.00.” Mich. Comp. Laws § 750.227(3) (2013).

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as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points.”). However, Defendant elected not to present any evidence on this issue, instead choosing to stipulate to the default classification of the offense as a Class I felony.

For the reasons explained above, the trial court did not err in accepting Defendant’s stipulation that he had a prior out-of-state conviction and that this conviction was a felony in Michigan. Defendant’s stipulation as to these questions of *fact* (as distinct from questions of *law*) mooted any contentions he may have raised as to the calculation of his prior record level under N.C. Gen. Stat. § 15A-1444(a2). We therefore dismiss Defendant’s appeal as to this issue. *See Hamby*, 129 N.C. App. at 369, 499 S.E.2d at 196 (“[I]f during plea negotiations the defendant essentially stipulated to matters that moot the issues he could have raised under subsection (a2) [of N.C. Gen. Stat. § 15A-1444], his appeal should be dismissed.”).

II. Ineffective Assistance of Counsel Claim

[2] Defendant next asserts that he was deprived of effective assistance of counsel when his trial counsel failed to present evidence concerning the substantial similarity between the Michigan offense of carrying a concealed weapon and the North Carolina offense of carrying a concealed weapon. In order to prevail on an ineffective assistance of counsel claim, “a defendant must show that (1) ‘counsel’s performance was deficient’ and (2) ‘the deficient performance prejudiced the defense.’” *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

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“In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This is so because on direct appeal, review is limited to the cold record, and the Court is “without the benefit of information provided by defendant to trial counsel, as well as defendant’s thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief.” *Id.* at 554-55, 557 S.E.2d at 547 (internal citation and quotation marks omitted). Only when “the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing” will an ineffective assistance of counsel claim be decided on the merits on direct appeal. *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L.Ed.2d 80 (2005).

Here, Defendant argues that trial counsel’s failure to present any evidence of the similarity between his out-of-state conviction and the corresponding North Carolina offense (1) was unreasonable and, therefore, deficient because “the reasonable course of action is to put forth evidence of the similarity to avoid a harsher sentence for the defendant”; and (2) prejudiced him because if such evidence “had been put forth showing the offenses are the same, [Defendant] would have been sentenced as a Prior Record Level I offender instead of a Prior Record Level II offender.”

When assessing whether an attorney’s performance was deficient for the purpose of analyzing a defendant’s ineffective assistance of counsel claim, it is well established that the defendant’s counsel “is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the required standard is a heavy one for defendant to bear.” *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L.Ed.2d 73 (2002). Here, it is conceivable that Defendant’s trial counsel had strategic reasons to accept the default classification of Defendant’s prior out-of-state conviction as a Class I felony.

Thus, because we cannot discern from the record before us whether his trial counsel’s failure to argue that Defendant’s prior conviction should be assigned zero points (based on the contention that it was substantially similar to a misdemeanor in North Carolina) was

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a matter of strategy in plea negotiations with the State, we conclude that Defendant's ineffective assistance of counsel claim should be dismissed without prejudice to his right to reassert it in a motion for appropriate relief. *See State v. al-Bayyinah*, 359 N.C. 741, 752-53, 616 S.E.2d 500, 509-10 (2005) (explaining that defendant's ineffective assistance of counsel claim was not reviewable on direct appeal because "[t]rial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test"), *cert. denied*, 547 U.S. 1076, 164 L.Ed.2d 528 (2006).

Conclusion

For the reasons stated above, we dismiss Defendant's appeal. Defendant's ineffective assistance of counsel claim is dismissed without prejudice to his right to reassert it through a motion for appropriate relief.

DISMISSED.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
STEPHANIE JEAN HOLANEK

No. COA14-951

Filed 18 August 2015

1. False Pretense—invoice submitted by defendant—companies did not exist

In defendant's trial for charges stemming from alleged insurance fraud, the trial court did not err by denying defendant's motion to dismiss the charges of obtaining property by false pretenses. The State offered substantial evidence that the moving companies on the invoices submitted by defendant to State Farm did not exist, allowing the jury to determine that the invoices were fraudulent. The State was not required to show what happened to the money that defendant obtained from State Farm.

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2. False Pretense—variance between indictment and evidence—estimate not “invoice”

In defendant’s trial for charges stemming from alleged insurance fraud, defendant received ineffective assistance of counsel because her attorney failed to argue that one count of obtaining property by false pretenses should be dismissed based on a fatal variance between the facts alleged in the indictment and the evidence presented at trial. The indictment referred to a “fraudulent invoice,” while the evidence showed that defendant submitted only an estimate of costs that would be incurred at the pet boarder. Defendant defrauded the insurance company by oral misrepresentation, not by a “fraudulent invoice.”

3. Evidence—failure to appear for insurance examination—awareness of fraudulent claims

In defendant’s trial for charges stemming from alleged insurance fraud, it was not plain error for the trial court to admit testimony that defendant had failed to appear for two scheduled examinations under oath required by her insurance policy and had failed to respond to requests to reschedule the examination. This testimony was relevant to show defendant’s awareness that she had submitted fraudulent claims. The Court of Appeals rejected defendant’s arguments that the testimony violated N.C.G.S. § 14-100(b) and Rule of Evidence 403.

4. False Pretense—jury instructions—failure to comply with contractual obligations of insurance policy

In defendant’s trial for charges stemming from alleged insurance fraud, it was not plain error for the trial court to omit jury instructions regarding N.C.G.S. § 14-100(b). The jury was expressly instructed that, in order to return a guilty verdict, it had to find that defendant had intended to defraud State Farm through her submission of documents containing false representations. No reasonable juror would have thought that defendant could be found guilty based solely on her failure to comply with the contractual obligations of her insurance policy.

5. False Pretense—indictment—not required to allege “exact misrepresentation”

The indictments charging defendant with obtaining property by false pretenses were not fatally defective for failure to allege the “exact misrepresentation” defendant made to her insurance company regarding moving expenses. The indictments alleged the

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essential elements of the crimes and the ultimate facts constituting those elements by stating that defendant obtained U.S. currency from State Farm through a false representation she made by submitting a fraudulent invoice which was intended to, and in fact did, deceive State Farm.

Appeal by defendant from judgment entered 7 March 2014 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 3 February 2015.

Roy Cooper, Attorney General, by Hugh A. Harris, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Jason Christopher Yoder, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Stephanie Jean Holanek (“Defendant”) appeals from her convictions for three counts of obtaining property by false pretenses. On appeal, Defendant contends that the trial court erred in (1) denying her motion to dismiss the charges of obtaining property by false pretenses based on the insufficiency of the evidence; (2) its instructions to the jury concerning the elements of obtaining property by false pretenses; (3) admitting testimony that Defendant did not appear for an examination under oath in connection with the claims she filed with her insurance company; (4) failing to give a jury instruction pursuant to N.C. Gen. Stat. § 14-100(b) where the State introduced evidence of Defendant’s breach of contract; and (5) entering judgment on her convictions because the indictments for each of the obtaining property by false pretenses charges were fatally defective. After careful review, we vacate in part and find no error in part.

Factual Background

The State’s evidence at trial tended to establish the following facts: On 26 September 2009, Defendant’s septic tank at her home in Wilmington, North Carolina backed up, causing the three toilets in her home to overflow and resulting in water damage to the first and second floors. Defendant filed a claim with her insurance company, State Farm Fire and Casualty Company (“State Farm”). A claims adjuster with State Farm, Jarred Norris (“Norris”), visited Defendant’s house to document the damage. State Farm issued a check for \$4,494.69 to Defendant in

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November 2009 to pay for the expenses of moving the contents of the first floor of her house into a storage unit. State Farm arranged for one of its contractors, Service Master, to perform the job.

On 18 October 2009, Defendant faxed State Farm an invoice in the amount of \$4,760.00 from an entity called M&M Movers that purported to be for the costs associated with moving the contents of the second floor of her house into storage. The invoice listed M&M Movers' business address as 817 West Rowan Avenue in Fayetteville, North Carolina.¹ Her fax coversheet stated that she had paid M&M Movers the amount listed on the invoice as well as an additional \$474.00 for storage fees. State Farm issued a check to Defendant in the total amount of \$5,234.00 to cover each of those expenses on 28 October 2009.

On 12 October 2009, Defendant checked four pets into Meadowsweet Pet Boarding and Grooming ("Meadowsweet") because the temporary rental home where she was living while her home was being repaired did not allow pets. Defendant initially made an electronic reservation for the pets to remain at Meadowsweet for only ten days (from 12 October to 22 October 2009), but the checkout date on the form was then changed to reflect the fact that the pets would remain at Meadowsweet through 12 November 2009.

Another claims adjuster, Chris Rowley ("Rowley"), informed Defendant that State Farm would cover pet boarding under her additional living expense coverage if she provided an estimate of the cost. Nevertheless, prior to her submission of such an estimate, State Farm issued a check to Defendant on 19 October 2009 for \$2,040.00 in pet boarding expenses.

Three days later, on 22 October 2009, Defendant submitted to State Farm a document that had been generated by Meadowsweet entitled "STATEMENT of CURRENT CHARGES — NOT a RECEIPT" listing the amount of \$2,040.00, which reflected Meadowsweet's estimate of the pet boarding costs that would apply to the boarding of her two dogs and two cats from 12 October to 12 November 2009. On the document, Defendant wrote a handwritten note stating as follows:

1. It was later revealed that this was the home address of Mike Beasley, Defendant's father-in-law, and Mike Beasley, Jr., his son.

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Please Reimburse for Pet Boarding

\$2,040.00 (30 days)

\$4,080.00 (60 days)

Thanks,
Stephanie Holanek

State Farm proceeded to issue monthly payments to her in the amount of \$2,040.00 for pet boarding expenses for approximately six months. Defendant periodically called State Farm during this time period to make sure that State Farm was continuing to issue checks for the pet boarding services.

On 25 February 2010, Rowley's manager asked him to obtain confirmation that the pets were still at Meadowsweet before State Farm would issue any further checks for pet boarding expenses. On several occasions, Rowley asked Defendant to confirm that her pets were still being boarded at Meadowsweet, and Defendant told him that "she was too busy to get the information for [him] from the kennel . . . but she would try and get it." State Farm ceased providing payments in April 2010, and in May 2010, Defendant told Rowley that her pets were going to be evicted because of outstanding amounts owed to Meadowsweet. Rowley then contacted Meadowsweet and learned from an employee that the animals were no longer at Meadowsweet and had been checked out back on 22 October 2009.² When Rowley confronted Defendant with this information over the phone, Defendant told him that she had taken her pets out of Meadowsweet and sent them with her brother to be boarded in a kennel in Fayetteville. Rowley requested the contact information for the new kennel, but Defendant never provided it to him.

On 28 July 2010, Defendant faxed State Farm an invoice for moving services from a business called PJ's Moving Company, purportedly located at 6012 Oleander Drive in Wilmington, North Carolina, in the amount of \$10,430.00. Defendant requested reimbursement for the moving expenses listed on the invoice, which consisted of three days of moving furniture from the temporary storage unit back into her home. A handwritten note at the top right corner of the invoice stated that the bill had been paid in full.

2. A receipt from Meadowsweet introduced at trial dated 22 October 2009 showed that Defendant's pets had, in fact, been checked out of Meadowsweet on 22 October and that a bill of \$845.00 had been paid by check. The receipt did not state who provided the check.

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Kent Dawdy (“Dawdy”), a claims representative in State Farm’s special investigative unit, was assigned to investigate Defendant’s insurance claim on 15 September 2010. Dawdy contacted Defendant the following day and informed her that State Farm was going to invoke a contractual policy provision allowing it to require her to submit to an examination under oath for the purpose of resolving questions about her claims. State Farm retained an attorney, J. Thomas Cox, Jr. (“Cox”), to conduct the examination. Cox mailed a letter to Defendant on 24 September 2010 requesting that she appear for the examination at a court reporter’s office on 20 October 2010, and Cox’s paralegal gave her a reminder call on 19 October 2010. Dawdy, Cox, and the court reporter appeared for the examination on 20 October and waited for Defendant for thirty minutes, but she did not appear. Cox then sent Defendant a letter on 28 October 2010 giving her the opportunity to schedule a new date for the examination, but she did not respond. Cox sent a third letter on 16 November 2010 informing her that the examination had been rescheduled for 30 November 2010, but, once again, she failed to appear for the examination.

In the course of his investigation, Dawdy attempted to locate PJ’s Moving Company but could not find the address contained in the invoice — 6012 Oleander Drive in Wilmington. He also attempted to find M&M Movers at 817 Rowan Avenue in Fayetteville and instead found a house located at that address. Dawdy did not observe moving equipment or trucks at the residence. In his trial testimony, he stated that he did not recall whether he had searched the Internet or used a phone book in an effort to locate either PJ’s Moving Company or M&M Movers. He explained that he did not do a more extensive search because State Farm’s attorney planned to ask Defendant to provide clarifying information about these entities at the examination.

On 9 December 2010, State Farm concluded that Defendant was not in compliance with the conditions of her policy based on her failure to appear for the scheduled examinations and denied her subsequent claims on that basis. Dawdy contacted the North Carolina Department of Insurance (“DOI”) to report State Farm’s suspicions that Defendant had committed insurance fraud. Mickey Biggs (“Biggs”), a criminal investigator with DOI, received the case on 12 December 2010 and began his investigation in May 2011. Biggs was unable to locate either M&M Movers or PJ’s Moving Company through Internet searches, phone calls, or physical visits.

On 17 January 2012, a grand jury indicted Defendant on four counts of insurance fraud, three counts of obtaining property by false pretenses,

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and one count of attempting to obtain property by false pretenses. The State voluntarily dismissed one count of insurance fraud and the charge of attempting to obtain property by false pretenses before trial.

The matter came on for a jury trial beginning 4 March 2014 in New Hanover County Superior Court before the Honorable Jay D. Hockenbury. Following the State's case-in-chief, Defendant offered evidence in her defense, calling her brother, Paul Thompson, Jr. ("Thompson"), as a witness. Thompson testified that he had moved to Wilmington in July 2010 to help Defendant because she had just opened a consignment store and given birth to triplets. He further testified that (1) he was operating PJ's Moving Company out of the back of the consignment store at 6012 Oleander Drive³; (2) he received referrals for his moving services from the consignment store; and (3) along with two other movers, he had moved the contents of the temporary storage unit back into Defendant's house and reassembled the furniture. Thompson also stated that he had prepared a handwritten invoice for the applicable expenses and charges that was then typed up by Defendant.

On 7 March 2014, the jury found Defendant guilty of all remaining charges — three counts of insurance fraud and three counts of obtaining property by false pretenses. The trial court arrested judgment on the three counts of insurance fraud, consolidated the three counts of obtaining property by false pretenses into a single judgment, and sentenced Defendant to a mitigated term of four to five months imprisonment. Defendant gave notice of appeal in open court six days after the conclusion of her trial.

Analysis**I. Appellate Jurisdiction**

As an initial matter, we must address the issue of whether appellate jurisdiction exists over Defendant's appeal. Rule 4 of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal from an order or judgment in a criminal action by (1) "giving oral notice of appeal at trial," or (2) "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C.R. App. P. 4(a).

3. During his investigation, Biggs was able to find a consignment store next to a storefront bearing the address 6010 Oleander Drive, but the consignment store's address was not visibly marked on the signage and the store was not open when he visited the location.

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In the present case, Defendant's trial counsel gave oral notice of appeal on 13 March 2014, six days after the conclusion of Defendant's trial, by appearing in open court before the judge who had presided over Defendant's criminal trial. However, because oral notice of appeal must be given *at trial*, Defendant's counsel's oral notice of appeal was legally ineffective. *See State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) ("Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial or . . . of the pretrial hearing. Otherwise, notice of appeal must be in writing and filed with the clerk of court." (internal citation omitted)).

In recognition of the fact that her notice of appeal was defective, Defendant has filed a petition for writ of certiorari asking this Court to consider her appeal. Pursuant to Rule 21(a)(1) of the Appellate Rules, this Court may, in its discretion, grant a petition for writ of certiorari and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). Here, Defendant lost her right to appeal through no fault of her own but rather due to her trial counsel's failure to give proper notice of appeal. We therefore dismiss the appeal, exercise our discretion to grant Defendant's petition for writ of certiorari, and proceed to address the merits of her arguments. *See In re I.T.P.-L*, 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008) (dismissing appeal based on defective notice of appeal but allowing petition for writ of certiorari pursuant to Rule 21), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009).

II. Denial of Motions to Dismiss

Defendant first argues that the trial court erred in denying her motions to dismiss each of the three counts of obtaining property by false pretenses, asserting that (1) there was insufficient evidence to support the two counts arising out of the payments she received based on the moving company invoices; and (2) with regard to the count stemming from the pet boarding expenses, there was a fatal variance between the indictment and the evidence introduced at trial. We address each of Defendant's arguments in turn.

A. Moving Company Invoices

[1] With regard to the counts stemming from the moving expenses, Defendant contends that the State failed to prove either that (1) the invoices contained a false representation; or (2) the movers were not paid by Defendant as she claimed. We disagree.

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“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

“Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the court decides that a reasonable inference of the defendant’s guilt may be drawn from the circumstances, then “it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.” *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). The defendant’s evidence should be disregarded unless it is favorable to the State or does not conflict with the State’s evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). When ruling on a motion to dismiss, the trial court should only be concerned with whether “the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence.” *Id.* at 67, 296 S.E.2d at 652.

The elements of the offense of obtaining property by false pretenses are: “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Defendant argues that the State failed to prove that Defendant made a false representation because it “failed to prove that [Defendant] did not pay the invoices as claimed.”

In making this argument, Defendant relies primarily upon *State v. Braswell*, ___ N.C. App. ___, 738 S.E.2d 229 (2013). In *Braswell*, the defendant was charged with obtaining property by false pretenses by means of an indictment alleging that he obtained \$112,500.00 from William Irvin Greene and Ola Beth Greene “by the defendant guaranteeing

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a six percent return on all invested monies from William Irvin Green [sic] and Ola Beth Green [sic], when in fact the defendant did not invest the monies into legitimate financial institutions.” *Id.* at ___, 738 S.E.2d at 233. On appeal, this Court held that the trial court had erred in denying the defendant’s motion to dismiss because the state failed to present evidence demonstrating that the defendant failed to invest the money he obtained from the Greenes in legitimate financial institutions and thus did not establish that “the representation that Defendant allegedly made to the Greenes was a false one.” *Id.* at ___, 738 S.E.2d at 234. We noted that the state did not present any evidence concerning the defendant’s financial records or offer any other “direct or circumstantial evidence tending to show that, instead of investing the money he borrowed from the Greenes, Defendant converted it to his own use.” *Id.* at ___, 738 S.E.2d at 234. Because the state did not offer any evidence explaining what had happened to the money the defendant obtained from the alleged victims, we concluded that the state (1) failed to prove that the defendant never invested the money in legitimate financial institutions as he had promised and, consequently, (2) did not establish the “key element of the offense . . . that the representation be intentionally false and deceptive.” *Id.* at ___, 738 S.E.2d at 233. Indeed, we observed that the evidence at trial suggested that the defendant had actually invested the Greenes’ money but then lost the funds when “his investment activities had gone catastrophically awry.” *Id.* at ___ n. 2, 738 S.E.2d at 234 n.2.

Defendant contends that the same result should apply here because the State neither introduced any of her financial records nor otherwise proved that she did not, in fact, pay the invoices as she had represented. She further argues that the State failed to establish that M&M Movers or PJ’s Moving Company did not exist and, therefore, the evidence did not support the conclusion that Defendant made a false representation to State Farm by submitting to it the invoices for the moving expenses in order to obtain payment. We are not persuaded.

The State presented evidence that during their respective investigations, neither Dawdy nor Biggs were able to uncover any evidence that M&M Movers or PJ’s Moving Company were operating as moving companies in North Carolina. Both investigators testified that the companies (1) were not physically located at the addresses listed on the invoices; (2) were unreachable at the telephone numbers provided therein; and (3) could not be located through an Internet search. Moreover, Defendant resisted State Farm’s attempts to afford her an opportunity

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to demonstrate the legitimacy of these expenses by repeatedly failing to appear for scheduled examinations under oath.⁴

By offering substantial evidence that the moving companies did not exist, the State was able to raise a question for the jury as to whether Defendant's submission of the invoices to State Farm claiming that payment had been made by her to these companies constituted a false representation. Because the State offered evidence sufficient to allow the jury to determine that these invoices were fraudulent, it was not obligated to show what happened to the money Defendant obtained from State Farm in order to prove her guilt.

Conversely, in *Braswell*, evidence of what had transpired with the funds obtained from the alleged victims *was* essential to proving the falsity of the defendant's representation in that case. In *Braswell*, the false representation alleged to have been made by the defendant was that he had promised to "invest the monies into legitimate financial institutions." *Id.* at ___, 738 S.E.2d at 233. In order to prove that this representation was false and intended to defraud the alleged victims, the state was required to show that the defendant did not actually invest the money at issue. The state did not do so and, therefore, failed to establish that the defendant made a false representation. Thus, *Braswell* is distinguishable from the present case, and Defendant's reliance on it is misplaced.

We conclude that sufficient evidence existed to support a finding by the jury that the two moving companies were fictitious and that by submitting the invoices, Defendant falsely represented that the invoices were legitimate in an effort to defraud State Farm and receive payment from it. Her submission of these invoices ultimately resulted in her obtaining \$15,190.00 from State Farm. Accordingly, the trial court did not err in denying her motion to dismiss as to these two counts.

B. Pet Boarding Expenses

[2] Defendant next argues that there was a fatal variance between the facts alleged in the indictment and the evidence presented at trial for the count of obtaining property by false pretenses concerning the Meadowsweet pet boarding charges. She acknowledges that her trial counsel did not specifically argue fatal variance as the basis for the motion to dismiss this count and thus failed to preserve this issue for

4. While Defendant challenges the trial court's admission of the evidence concerning her failure to appear for the examination under oath, this evidence was properly admitted by the trial court as discussed *infra*.

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appellate review. *See State v. Redman*, 224 N.C. App. 363, 367-68, 736 S.E.2d 545, 549 (2012) (“To preserve the issue of a fatal variance for review, a defendant must state at trial that a fatal variance is the basis for the motion to dismiss.”). However, she contends that her counsel’s failure to identify the fatal variance between the indictment and the evidence at trial constitutes ineffective assistance of counsel because the motion to dismiss would have been granted if her trial counsel had expressly made a motion to dismiss on this specific ground. We agree.

In order to establish ineffective assistance of counsel, “a defendant must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense.” *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

“It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State’s proof must conform to the specific allegations contained therein.” *State v. Henry*, ___ N.C. App. ___, ___, 765 S.E.2d 94, 102 (2014) (citation, quotation marks, and brackets omitted). “A variance occurs where the allegations in an indictment . . . do not conform to the evidence actually established at trial.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). In order for it to be material, and therefore require reversal, the variance must involve an essential element of the crime charged. *See State v. Glynn*, 178 N.C. App. 689, 696, 632 S.E.2d 551, 556 (“Only a material variance warrants reversal, as it involves an essential element of the alleged crime.”), *appeal dismissed and disc. review denied*, 360 N.C. 651, 637 S.E.2d 180-81 (2006).

The purposes of an indictment are: “(1) to identify the crime with which defendant is charged, (2) to protect defendant against being

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charged twice for the same offense, (3) to provide defendant with a basis on which to prepare a defense, and (4) to guide the court in sentencing.” *State v. Wright*, 200 N.C. App. 578, 585, 685 S.E.2d 109, 114 (2009) (citation and quotation marks omitted), *appeal dismissed*, 363 N.C. 812, 693 S.E.2d 142 (2010). “When a variance exists between allegations in the indictment and evidence presented at trial, the defendant may be deprived of adequate notice to prepare a defense.” *Glynn*, 178 N.C. App. at 696, 632 S.E.2d at 556.

Here, the indictment for this count of obtaining property by false pretenses alleged the following:

[T]he defendant named above unlawfully, willfully, and feloniously did knowingly and designedly with intent to cheat and defraud, obtain \$11,395.00 in U.S. currency from State Farm Fire and Casualty Company by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: this property was obtained when the defendant submitted an invoice for services rendered by Meadowsweet Pet Boarding & Grooming, seeking reimbursement from State Farm Fire and Casualty Company under the terms of the defendant’s Home Owner Insurance Policy, when in fact the invoice submitted was a fraudulent invoice.

Thus, the theory of the offense alleged in the indictment was that Defendant submitted a fraudulent invoice for pet boarding services rendered by Meadowsweet to State Farm, which caused State Farm to issue payment to her in the amount of \$11,395.00. The evidence at trial, however, tended to show that the document at issue was an *estimate* — not “an invoice for services rendered” — for the cost of boarding the four pets for one month, which was generated by Meadowsweet on 12 October 2009 (the day of the pets’ arrival at Meadowsweet). Leanna Willard (“Willard”), the owner of Meadowsweet, testified as follows:

[Prosecutor]: I want to show you what’s previously been admitted as State’s Exhibit 16. Do you recognize this document?

[Willard]: It is an estimate of charges for Stephanie Holanek’s four animals from October 12th, 2009 to November 12th, 2009.

Q. At what facility?

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A. Meadowsweet Pet Boarding and Grooming.

Q. Your facility, correct?

A. Yes.

Q. And, again, let's go through it again. An estimate, how do you know this is an estimate, not a receipt?

A. Because it says "Statement of current charges," not "Receipt" at the top. And at the bottom it has a total of \$2,040.00 where a receipt would show the paid amount and it would show how it was paid: check, credit card, cash, et cetera.

Q. Does this appear to be legitimate?

A. Yes, it's an estimate for a 30-day stay for the four animals, yes.⁵

We note that because this document was generated on the same date the pets were checked into Meadowsweet, it could not logically have been an invoice "for services *rendered* by Meadowsweet" as alleged in the indictment. (Emphasis added.) Indeed, the evidence at trial showed that Rowley, the State Farm claims adjuster, was aware that the document was an estimate as Rowley testified that (1) Defendant had provided this document to him after he requested information "on what it would cost to board her pets during the time she was out of the home"; and (2) it was his understanding that "this was an estimate . . . since her dogs hadn't been boarded there for more than 30 days." For similar reasons, Defendant's handwritten note on the document requesting reimbursement could not have been construed by State Farm as a request for payment as to services that had actually been rendered given that the document was faxed by Defendant only ten days after the 12 October 2009 date reflected on the document as the date the pets were *first placed* with Meadowsweet.

Furthermore, there was no evidence at trial suggesting that the written estimate was anything other than a document created in good faith by Meadowsweet that accurately itemized the costs to be incurred

5. We observe that the prosecutor referred to this document as an "estimate" throughout the trial, at one point directing the court reporter to strike his own question to Rowley as to whether State Farm continued "to pay pet boarding based upon this *invoice*" and then rephrasing the question to ask if State Farm continued to pay pet boarding "based upon this *estimate*." (Emphasis added.)

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— prospectively — for the boarding of Defendant’s pets from 12 October 2009 to 12 November 2009. Thus, in addition to the fact that the document Defendant submitted from Meadowsweet was not an invoice, it was also not fraudulent.

Notably, this document was faxed to State Farm on 22 October 2009, three days *after* State Farm issued a check to Defendant. Therefore, the issuance of this payment by State Farm could not logically have been triggered by Defendant’s submission of the document. *See State v. Childers*, 80 N.C. App. 236, 241, 341 S.E.2d 760, 763 (explaining that offense of obtaining property by false pretenses requires “a causal connection between the alleged false representation and the obtaining of the property or money”), *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986).

In addition, the State’s evidence at trial tended to show that it was not the written estimate that falsely led State Farm to believe that her pets remained at Meadowsweet long after they had been removed from Meadowsweet’s care but rather the *oral* misrepresentations made by Defendant during the time period between 22 October 2009 and April 2010. Thus, contrary to the allegations contained in the indictment that Defendant obtained payments for pet boarding expenses from State Farm through the false pretense of submitting a “fraudulent invoice,” the evidence introduced at trial showed that (1) Defendant submitted a valid estimate of the expenses that would have been incurred had her four pets stayed at Meadowsweet for a full month; and (2) Defendant subsequently obtained payments from State Farm through *oral* misrepresentations that were made by her over the next six months to the effect that she was entitled to continue receiving such payments despite the fact that she had removed her pets from Meadowsweet on 22 October 2009.

Our Supreme Court has explained that with regard to the offense of obtaining property by false pretenses, “[t]he state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged” and that “[i]f the state’s evidence fails to establish that defendant made this misrepresentation but tends to show *some other misrepresentation was made*, then the state’s proof varies fatally from the indictments.” *State v. Linker*, 309 N.C. 612, 615, 308 S.E.2d 309, 311 (1983) (emphasis added).

Indeed, we find the present case analogous to *Linker*. In *Linker*, the defendant was charged with two counts of obtaining property by false pretenses. The indictments alleged that the defendant, whose name was Barry L. Linker and who was not an accountholder at Wachovia Bank,

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had committed the false pretense of “represent[ing] himself as Barry W. Linker who did have a valid account and attempted to cash a check for \$120.00” in order to obtain property from Wachovia. *Id.* at 613, 308 S.E.2d at 310 (emphasis added). The evidence at trial, however, showed that the defendant presented the bank tellers with a valid driver’s license identifying himself as Barry L. Linker and when questioned about the differing middle initial between his driver’s license and the information on the account stated that the initial on the account was incorrect. *Id.* at 614, 308 S.E.2d at 310.

The Supreme Court determined that the trial court erred in denying the defendant’s motion to dismiss based on a fatal variance because the evidence at trial did not support the misrepresentation alleged in the indictment. *Id.* at 616, 308 S.E.2d at 311. While the Supreme Court acknowledged that the evidence presented at trial would have supported a charge of obtaining property by false pretenses based on the defendant misrepresenting the fact that he had a Wachovia account when he did not actually possess one, that misrepresentation was not the misrepresentation alleged in the indictment. *Id.* at 615 n. 2, 308 S.E.2d at 311 n. 2.

The indictments explicate the alleged misrepresentation in clear and unequivocal terms: Defendant “represented himself as Barry W. Linker.” The record clearly reflects that the state failed to prove that defendant represented himself as Barry W. Linker. Without exception, each of the state’s witnesses testified that defendant never represented himself as Barry W. Linker. Instead, he gave each bank employee his driver’s license which established that he was, in fact, Barry L. Linker. Simply put, defendant never made the misrepresentation charged in both indictments.

Id. at 615, 308 S.E.2d at 311. The Supreme Court concluded that because the defendant “positively identified himself [as Barry L. Linker] with his driver’s license to each bank official. . . . the state’s proof varied fatally from the allegations in the indictment.” *Id.* at 616, 308 S.E.2d at 311.

The same reasoning applies here. Unlike the evidence supporting the counts relating to the moving company charges, the evidence did not support a finding that the document Defendant submitted to State Farm with regard to pet boarding services at Meadowsweet was a “fraudulent invoice” as alleged in the indictment. While Defendant’s repeated oral misrepresentations that allowed Defendant to improperly obtain payments from State Farm over the next six months — consisting of

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her false assurances that her pets remained boarded at Meadowsweet beyond 22 October 2009 — *could have* given rise to the offense of obtaining property by false pretenses if contained within the indictment, the indictment as to this count did not allege them.

In short, the document at issue was not a “fraudulent invoice” purporting to be from an entity that was actually fictitious (as was the case regarding the moving expenses) but rather a genuine estimate prepared by a legitimate business. It could not have been construed as an invoice for services previously rendered because it was generated the first day Defendant placed her pets with Meadowsweet. The initial payment of \$2,040.00 was issued by State Farm before it ever received the written estimate. The remaining payments comprising the \$11,395.00 figure listed in the indictment were induced by Defendant’s false oral representations over the next six months that her pets continued to be boarded at Meadowsweet. Accordingly, there was a fatal variance between the allegations of the indictment and the evidence presented at trial to establish this count of obtaining property by false pretenses. For this reason, we must vacate Defendant’s conviction on this count. *See State v. Gayton-Barbosa*, 197 N.C. App. 129, 136-37, 676 S.E.2d 586, 591 (2009) (vacating defendant’s larceny conviction due to fatal variance between indictment and evidence presented at trial).⁶

III. Admissibility of Evidence Concerning Defendant’s Failure to Attend Scheduled Examinations

[3] Defendant next contends that the trial court erred in admitting testimony that she did not appear for two scheduled examinations under oath as required by her insurance policy and failed to respond to State Farm’s request to reschedule the examination. Defendant acknowledges that she failed to object to the introduction of this evidence and that, consequently, this Court’s review of the admission of this evidence is limited to plain error.

In order to establish plain error, Defendant bears the burden of showing that a fundamental error occurred at trial. *State v. Lawrence*,

6. Defendant also asserts that the trial court either (1) deprived her of her constitutional right to a unanimous verdict; or, alternatively, (2) committed plain error, by instructing the jury that it could find her guilty of obtaining property by false pretenses if it found that Defendant had made *either* written *or* oral misrepresentations to State Farm concerning the pet boarding expenses at Meadowsweet. However, we need not address these contentions nor the remaining arguments in her brief as applied to the pet boarding count because we are vacating her conviction on this count due to the fatal variance discussed above.

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365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citation and quotation marks omitted).

Defendant makes three arguments challenging the admissibility of this evidence. First, she asserts that this evidence was irrelevant and, therefore, inadmissible under Rules 401 and 402 of the North Carolina Rules of Evidence. Second, she contends that the evidence violated N.C. Gen. Stat. § 14-100(b). Third, she argues that the evidence should have been excluded pursuant to Rule 403 of the North Carolina Rules of Evidence. We address each of these issues in turn.

A. Relevance

Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C.R. Evid. 401. Irrelevant evidence, conversely, is evidence “having no tendency to prove a fact at issue in the case.” *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992). Rule 402 provides that relevant evidence is generally admissible at trial while irrelevant evidence is not admissible. N.C.R. Evid. 402.

We do not agree with Defendant’s assertion here that the evidence concerning her failure to appear for an examination under oath pursuant to the terms of her insurance policy with State Farm was not relevant. In order to establish the offense of obtaining property by false pretenses, the State was required to prove that Defendant’s acts were done “knowingly and designedly . . . with intent to cheat or defraud.” *State v. Hines*, 54 N.C. App. 529, 532-33, 284 S.E.2d 164, 167 (1981) (quotation marks omitted); *see also* N.C. Gen. Stat. § 14-100 (2011). As this Court has previously observed, “a person’s intent is seldom provable by direct evidence, and must usually be shown through circumstantial evidence.” *State v. Walston*, 140 N.C. App. 327, 332, 536 S.E.2d 630, 633 (2000) (citation, quotation marks, and brackets omitted). “In determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and general circumstances existing at the time of the alleged commission of the offense charged[.]” *Id.* at 332, 536 S.E.2d at 634 (citation, quotation marks, and brackets omitted).

In the present case, Dawdy testified that Defendant’s insurance claim was referred to him as a potential fraud case because of “indicators [of

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fraud] with respect to the unresolved pet boarding charges” and a supplemental claim for additional personal property losses totaling \$59,000.00. When he received the case, Dawdy contacted Defendant, apprised her of his role with State Farm, and informed her that State Farm had questions concerning her submitted claims and would be invoking “a policy provision called an examination under oath,” which he explained as “an opportunity for [the] policyholder to come in and under oath give testimony to us about the questions we have” concerning the claim at issue.

Dawdy further testified that the examination was initially scheduled for 20 October 2010 but that Defendant did not appear for the examination on that date. Defendant was then sent a “second chance letter” requesting that she contact Cox, State Farm’s attorney, within ten days to reschedule the examination. When she did not respond, Cox sent another letter on 16 November 2010 informing her that the examination had been rescheduled for 30 November 2010, but she did not show up for the examination on that date. Defendant’s failure to appear for any of the scheduled examinations as well as the fact that she did not contact Dawdy or Cox to reschedule the examination constituted circumstantial evidence tending to show that her submission of requests for payments to which she was not entitled was done “knowingly and designedly . . . with intent to cheat or defraud.” N.C. Gen. Stat. § 14-100(a). Because Defendant was informed that the purpose of the examination under oath was to enable State Farm to further investigate the legitimacy of her insurance claims, her failure to respond and to attend or reschedule the examination raised a reasonable inference as to her awareness that her claims were fraudulent. Accordingly, because this evidence was relevant to an essential element of an offense for which she was charged, its admission did not violate Rule 402.

B. N.C. Gen. Stat. § 14-100(b)

Defendant also contends that the trial court’s admission of this evidence constituted plain error because it violated subsection (b) of N.C. Gen. Stat. § 14-100 (the statute codifying the crime of obtaining property by false pretenses), which states that “[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.” N.C. Gen. Stat. § 14-100(b). However, nothing in N.C. Gen. Stat. § 14-100(b) renders this type of evidence inadmissible. Rather, subsection (b) simply makes clear that such evidence — without more — is insufficient to satisfy the intent to defraud element of this offense. Thus, her argument that N.C. Gen. Stat. § 14-100(b) served as a bar to the *admissibility* of this evidence lacks merit.

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C. Rule 403

Finally, Defendant contends that even if the evidence of her failure to appear for an examination under oath possessed some degree of relevance, it nevertheless should have been excluded under Rule 403 because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to her. Pursuant to Rule 403, the trial court may, in its discretion, exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C.R. Evid. 403.

However, as we explained in *State v. Cunningham*, 188 N.C. App. 832, 656 S.E.2d 697 (2008), “[t]he balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error to issues which fall within the realm of the trial court’s discretion.” *Id.* at 837, 656 S.E.2d at 700 (citation and quotation marks omitted). Therefore, Defendant’s attempt to rely on Rule 403 as to this issue is misplaced.

IV. Jury Instruction on Breach of Contract

[4] In a related argument, Defendant also contends that the trial court erred by failing to instruct the jury that pursuant to N.C. Gen. Stat. § 14-100(b), “[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.” Defendant did not request this instruction, and therefore, we review the trial court’s failure to give this instruction solely for plain error. *See Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (explaining that alleged instructional errors that are unpreserved only rise to the level of plain error where “the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty” (citation and quotation marks omitted)).

In *Hines*, we rejected a similar argument. The defendant in *Hines* had been charged with two counts of obtaining property by false pretenses arising out of allegations that he had obtained money from the victims by representing that he would arrange the incorporation of a proposed business venture between them and secure a site for the business at a local shopping mall. *Hines*, 54 N.C. App. at 531-32, 284 S.E.2d at 166. Contrary to his representations, the defendant did not actually take steps to incorporate the business nor did he use the money he obtained from them as a rental deposit for a storefront. *Id.* at 532, 284 S.E.2d at 166. On appeal, the defendant argued that the trial court erred by failing

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to expressly inform the jury that, based on N.C. Gen. Stat. § 14-100(b), the element of intent to defraud could not, without more, be established by the breach of a contractual obligation. *Id.* at 536, 284 S.E.2d at 169. This Court disagreed, explaining that (1) the trial court “instructed on all essential elements of obtaining property by false pretense” and “all substantial features of the case”; and (2) “[t]he jury could not have been misled by the instructions given to find defendant guilty solely on the ground that he did not fulfill his contractual obligations.” *Id.* (citation and quotation marks omitted). The same is true in the present case.

Here, the trial court instructed the jury that it could only find Defendant guilty of each of the two counts of obtaining property by false pretenses concerning the moving company invoices if it found that (1) Defendant “made a representation by presenting a written statement to State Farm Fire and Casualty Company for services rendered” by (a) M&M Movers in the amount of \$4,760.00, or (b) PJ’s Moving Company in the amount of \$10,430.00; (2) the representation was false; (3) the representation was calculated and intended to deceive; (4) State Farm was in fact deceived by it; and (5) Defendant obtained the property at issue from State Farm as a result of making the representation.

Thus, the jury was expressly informed that it was required to determine that Defendant intended to defraud State Farm through her submission of documents containing false representations in order to return a guilty verdict. Therefore, no reasonable juror could have been left with the mistaken belief that she could be found guilty based solely on her failure to comply with contractual obligations under her insurance policy. For this reason, her argument on this issue is without merit.

V. Alleged Failure of Indictments to Adequately Apprise Defendant of Charges

[5] In her final argument, Defendant argues that the indictments were fatally defective because they did not allege the “exact misrepresentation” she made with sufficient precision. We disagree.

The failure of a criminal pleading to charge the essential elements of the stated offense is an error of law that is reviewed *de novo*. *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). As discussed above, a primary purpose of an indictment “is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused” *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (citation and quotation marks omitted). Thus, in order to be valid, “[a]n indictment . . . charging a statutory offense must allege

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all of the essential elements of the offense.” *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975). Because the indictments concerning the moving company expenses did not specifically allege how, or in what manner, the invoices Defendant submitted were fraudulent, she argues that they were fatally defective.

“The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” *State v. Harris*, 219 N.C. App. 590, 592-93, 724 S.E.2d 633, 636 (2012) (citation and quotation marks omitted). Furthermore, in alleging the essential elements of the charge, an indictment “need only allege the ultimate facts constituting each element of the criminal offense.” *Id.* at 592, 724 S.E.2d at 636 (citation and quotation marks omitted). “Pursuant to N.C. Gen. Stat. § 14-100, our Supreme Court has defined the offense of [obtaining property by] false pretenses as (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *Walston*, 140 N.C. App. at 332, 536 S.E.2d at 633 (citation and quotation marks omitted).

We believe the indictments for the two counts relating to the moving expenses were legally sufficient. Each alleges both the essential elements of the offense and the ultimate facts constituting those elements by stating that Defendant obtained U.S. currency from State Farm through a false representation she made by *submitting a fraudulent invoice* which was intended to — and, in fact, did — deceive State Farm. Therefore, it was clear from the indictments that the false invoices she submitted purporting to be from PJ’s Moving Company and M&M Movers formed the basis for these counts. Thus, Defendant’s argument on this issue is overruled.

Conclusion

For the reasons stated above, we vacate Defendant’s conviction on the count of obtaining property by false pretenses arising from the pet boarding expenses. We find no error as to Defendant’s remaining convictions. Because the count we are vacating was consolidated for judgment with the two other counts of obtaining property by false pretenses, we remand for resentencing so that the trial court may enter a new judgment on the convictions being upheld. *See State v. Williams*, 150 N.C. App. 497, 506, 563 S.E.2d 616, 621 (2002) (remanding for resentencing after vacating one offense in consolidated judgment because

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whether remaining offense “warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider”).⁷

VACATED IN PART; NO ERROR IN PART.

Judges ELMORE and TYSON concur.

STATE OF NORTH CAROLINA

v.

THEDFORD ROY RORIE, JR.

No. COA14-886

Filed 18 August 2015

1. Evidence—rape of child—child seen watching pornographic video—evidence excluded

The trial court erred in a prosecution for rape of a child and indecent liberties by excluding evidence that defendant had found the child watching a pornographic video, which defendant had sought to admit to establish an alternate basis for her sexual knowledge. The trial court erred whether it excluded the evidence based on relevance or under Rule 412. Without the evidence suggesting an alternative source of A.P.’s sexual knowledge in this case, it is likely the jury concluded A.P.’s allegations were true because A.P. was a critical witness against defendant and there was no known basis from which she could have had the knowledge to fabricate the allegations.

2. Evidence—prior allegations and inconsistent statements by child—admissible to attack credibility

In an appeal remanded on other grounds, the trial erred by excluding evidence that the prior allegations and inconsistent statements by a child regarding sexual abuse were covered by Rule 412. The statements were not within the purview of Rule 412 and were admissible to attack her credibility. However, whether they should be admitted at retrial was not determined.

7. We note, however, that it appears from the record that Defendant has already served the sentence of imprisonment imposed in the consolidated judgement.

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Appeal by defendant from judgments entered 23 July 2014 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 19 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

McCULLOUGH, Judge.

Thedford Roy Rorie, Jr. (“defendant”) appeals from judgments entered upon his convictions for one count of rape of a child in violation of N.C. Gen. Stat. § 14-27.2A, one count of indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1, attaining habitual felon status as defined in N.C. Gen. Stat. § 14-7.1, and three counts of sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4A. For the following reasons, we grant defendant a new trial.

I. Background

Defendant was arrested by the Winston-Salem Police Department in October 2012 on charges of first degree rape and taking indecent liberties with a child. In indictments returned by Forsyth County Grand Juries on 7 January 2013, 3 June 2013, and 8 July 2013, defendant was indicted on one count of rape of a child, one count of taking indecent liberties with a child, attaining habitual felon status, and three counts of sexual offense with a child.¹ Defendant pled not guilty to all charges.

Prior to the case coming on for trial, defendant filed a notice of a potential Rule 412 issue and the State filed a motion in limine to exclude any evidence of the alleged victim’s, A.P.’s², prior sexual activity pursuant to Rule 412. These pre-trial matters were among the first issues considered after the offenses were joined and called for trial in Forsyth County Superior Court before the Honorable A. Moses Massey on 15 July 2013.

1. On 3 June 2013, a Forsyth County Grand Jury also returned a superseding indictment changing the date range of the rape of a child and the taking indecent liberties with a child offenses in the 7 January 2013 indictment.

2. Initials are used throughout the opinion to protect the identities of minor children.

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Concerning defendant's notice of a potential Rule 412 issue, defendant argued prior inconsistent statements or false allegations by A.P. against two young boys living in the same house as A.P. that were similar in nature to the allegations in the present case should be allowed into evidence to attack A.P.'s credibility. In response, the State asserted A.P.'s prior statements regarding the two boys should be excluded because the statements did not amount to false allegations, but were merely the result of a misunderstanding. Moreover, the State asserted the evidence was irrelevant to the charges against defendant. Despite the disagreement over the admissibility of the evidence, both parties acknowledged they did not necessarily believe there was a Rule 412 issue because Rule 412 concerns activity, not statements. Following an in camera review of the interview in which A.P. made the statements at issue, the trial court made a tentative ruling that the evidence was irrelevant and inadmissible. Yet, emphasizing the ruling was tentative, the trial court added that some portion of the evidence may become relevant for impeachment purposes. Lastly, the trial court noted the evidence was covered by Rule 412 and the exceptions to Rule 412 did not appear to apply. The jury was empaneled and the trial proceeded the following day.

The evidence presented at trial tended to show the following: Sometime in the spring or summer of 2011, A.P.'s mother ("Ms. Williams") allowed defendant and defendant's girlfriend ("Ms. Jones"), both of whom she was good friends with, to rent a room for themselves and Ms. Jones' baby in the four-bedroom house in which Ms. Williams, A.P., A.P.'s younger brother T.P., A.P.'s father ("Mr. Payne"), and, from time to time, others lived. A.P. was six years old at the time.

Ms. Williams testified defendant was sweet to her kids, noting that A.P. referred to defendant as "Uncle Peanut." Ms. Williams recalled that defendant and A.P. sometimes called each other boyfriend and girlfriend, but she did not think it was serious and she never observed anything that caused her to believe there was an inappropriate relationship. Although Ms. Williams indicated defendant was not a normal babysitter for her kids, Ms. Williams testified defendant was left alone with A.P., T.P., and Ms. Jones' baby one night in November 2011 while she and Ms. Jones went to play bingo. The evidence tended to show that Ms. Williams and Ms. Jones were away from the house from six or seven o'clock that evening until approximately two o'clock the next morning.

A.P. testified that while Ms. Williams and Ms. Jones were at bingo and her dad was at work, defendant "raped [her] in both parts." When asked more specifically what defendant did, A.P. testified that "[defendant] put his private in [her] private and put his private in [her] butt."

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A.P. then described in more detail how defendant came into her and T.P.'s bedroom while they were asleep, woke her up, raped her in both parts, let her go back to sleep, and then woke her up a second time and repeated the acts. A.P. also testified that on days prior to the night of the alleged rape, defendant put his private in her mouth. A.P. testified this happened in defendant's bedroom with the door locked while the other adults were outside or somewhere else.

A.P. did not immediately tell Ms. Williams, or anyone else, about what defendant did because she thought Ms. Williams would get angry. Various witnesses testified they did not notice a change in the interactions between defendant and A.P. following the bingo night in question in November 2011.

Ms. Jones became pregnant with defendant's child during the time they lived in the house and gave birth in February 2012. Defendant and Ms. Jones moved out shortly thereafter. It was not until after defendant and Ms. Jones moved out that A.P. told others what had happened.

Soon after defendant and Ms. Jones moved out of the house in March 2012, another man ("Mr. Coles"), his girlfriend, and his girlfriend's three children, all older than A.P., moved in. Sometime thereafter in May 2012, A.P. mentioned to the kids that defendant had raped her. One of the kids then told Mr. Coles, who questioned A.P. and called Ms. Williams to inform her of A.P.'s accusations. Ms. Williams came home upon receiving the call from Mr. Coles, questioned A.P. about the allegations, and took A.P. to the emergency department of the hospital, where A.P. was examined and interviewed.

The sexual assault nurse examiner who examined A.P. reported a "5:00 hymenal notch that [she] was concerned about." The nurse testified that the notch could be consistent with a penetrating injury. The nurse, however, was not certain because the alleged rape had purportedly occurred months earlier. The evidence further revealed that on 13 December 2011, A.P. was previously taken to the emergency department at the hospital complaining of pain while urinating. At that time, the attending physician in the pediatric emergency department performed only an external vaginal examination because there was no report of sexual abuse. Upon observing no abnormalities, the physician diagnosed A.P. with vaginitis. The physician, however, testified at trial that one of the potential causes of vaginitis is sex.

Following the State's evidence, defendant took the stand in his own defense and denied all of A.P.'s allegations. Defendant's recollection of the night in November 2011 when he watched A.P. and T.P. while Ms.

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Williams and Ms. Jones went to bingo differed from other witnesses' recollection. Particularly noteworthy, defendant testified that Ms. William's sister was at the house the entire time and stayed with the children while he left the house on three separate occasions to deliver marijuana. Defendant also testified that his niece came to the house around eleven o'clock that night and left shortly after midnight. Defendant recalled that he went to check on A.P. and T.P. several times throughout the course of the night and each time they were asleep in their bedroom.

Defendant also sought to present evidence of A.P.'s sexual knowledge by introducing evidence that he found A.P. watching a pornographic video. Specifically, on *voir dire*, defendant testified he caught A.P. and T.P. watching a pornographic DVD of "[a]dults naked having sex[]" one morning while the other adults in the house were still asleep. Defendant stated that he asked A.P. what she was watching and A.P. replied "[she] was trying to find cartoons." Defendant then "immediately cut it off, found them a cartoon movie, [and] put it in." Defendant testified he told Ms. Williams and Mr. Payne what he had seen when they woke up, which caused Mr. Payne to go through and remove all of the adult DVDs. Upon considering the arguments from both sides, the trial court initially overruled the State's objection to the evidence. The trial court, however, later reversed its decision and sustained the State's objection on the basis that the evidence was "irrelevant and is not admissible, particularly given the fact that in this case there is evidence consistent with sexual abuse, physical evidence consistent with sexual abuse."

On 22 July 2013, the jury returned guilty verdicts for the rape of a child, taking indecent liberties with a child, and sexual offense with a child offenses. The following day the jury returned a verdict finding the presence of an aggravating factor; defendant entered a guilty plea to attaining the status of a habitual felon, and the trial court consolidated the offenses between the two judgments for sentencing. Finding the factors in aggravation outweighed the factors in mitigation, the trial court sentenced defendant in the aggravated range to two consecutive terms of 345 to 426 months imprisonment. Furthermore, the trial court ordered defendant to register as a sex offender for life and enroll in satellite based monitoring for life upon his release from imprisonment. Defendant gave notice of appeal in open court following sentencing.

II. Discussion

On appeal, defendant raises the following three issues: whether (1) the trial court erred by excluding evidence that he found A.P. watching the pornographic video; (2) the trial court erred by excluding evidence

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of A.P.'s prior allegations and inconsistent statements regarding sexual assaults by two boys living in the house; and (3) the trial court's cumulative evidentiary errors deprived him of a fair trial.

Evidence of Pornography

[1] Defendant first contends the trial court erred in excluding the evidence that he found A.P. watching a pornographic video. Defendant argues the evidence was relevant and admissible to establish an alternative basis for A.P.'s sexual knowledge, from which A.P. could fabricate the allegations against defendant. Defendant contends this evidence was important to his case because absent the evidence, a jury would assume a child of A.P.'s age would not have the sexual knowledge to fabricate such allegations.

Expanding on the background, defendant's counsel recognized there was a potential issue with this evidence during the trial and requested to discuss the matter out of the presence of the jury. Following a brief bench conference, the trial court excused the jury and conducted a *voir dire*. After initially ruling that the defendant could testify about finding A.P. watching the pornographic video, the trial court reconsidered its decision and ruled that the evidence was irrelevant and inadmissible based on its interpretation of *State v. Yearwood*, 147 N.C. App. 662, 556 S.E.2d 672 (2001).

At the outset of our analysis, we note that it is not clear from the record whether the trial court excluded the evidence solely on the basis of relevance or whether the trial court considered Rule 412. Upon consideration of both on appeal, we hold the trial court erred in either instance.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). In a sexual abuse case, evidence regarding the victim's prior sexual behavior is severely restricted pursuant to N.C. Gen. Stat. § 8C-1, Rule 412 (2013) (the "Rape Shield Statute" or "Rule 412"), which provides the sexual behavior of the complainant, defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial[,] is irrelevant unless the behavior falls under specified exceptions. N.C. Gen. Stat. § 8C-1, Rule 412 (a) and (b). Rule 412 is applicable in trials on charges of rape and sex offense, *see* N.C. Gen. Stat. § 8C-1, Rule 412(d), and

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thus clearly applies in this case involving charges of rape of a child and sexual offense with a child. Yet, there is no North Carolina case law interpreting the admission of this particular type of evidence in a child sex offense case.

The State argues A.P.'s viewing of pornography is evidence of A.P.'s sexual activity other than with defendant and, therefore, should be excluded pursuant to Rule 412. In support of its argument, the State relies on *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996), and contends the trial court's consideration of *Yearwood* indicates the trial court analyzed the relevancy of the evidence pursuant to Rule 412. Upon review, we find the present case distinguishable from *Bass* and *Yearwood*.

The State contends *Bass* is "[t]he closest case in North Carolina that deals with the issue of 'sexual knowledge.'" In *Bass*, a defendant charged with taking indecent liberties with a child and first degree statutory sexual offense sought to show the six year old complainant had the sexual knowledge to fabricate the allegations by introducing evidence "that the [complainant] had been assaulted in a similar manner some three years earlier." *Bass*, 121 N.C. App. at 308-09, 465 S.E.2d at 335. The trial court excluded the evidence pursuant to Rule 412 and the defendant appealed the ruling following his convictions. *Id.* at 309, 465 S.E.2d at 335. Although this Court granted a new trial based on an improper closing argument by the prosecution, it upheld the trial court's exclusion of the evidence of prior abuse concluding "the prior abuse alleged . . . [was] 'sexual activity' within the ambit of Rule 412." *Id.* at 309-10, 465 S.E.2d at 336.

In *Yearwood*, relied on by the trial court, an expert in child psychology testified that the twelve year old complainant was extremely distressed and agitated when they met four days after the assault and opined that the complainant's behavior was consistent with patterns observed in a sexually assaulted victim. *Yearwood*, 147 N.C. App. at 664, 556 S.E.2d at 674. Yet, following *voir dire* in which the expert "admitted to some knowledge of alleged incidents involving [the child] and her father, where the father would allegedly strip in front of [the child] and expose her to pornographic material[.]" the trial court denied the defendant the opportunity to explore the purported sexual abuse by the child's father, which occurred four to seven years earlier. *Id.* at 664-65, 556 S.E.2d at 674. On appeal, the defendant argued the trial court erred because "the evidence [was] relevant to cast doubt on the credibility of [the expert]" because "this exposure may have been the cause of [the complainant's] behavior which led [the expert] to conclude that [the complainant] had been sexually assaulted." *Id.* at 665, 556 S.E.2d

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at 675. This Court rejected defendant's argument, noting the defendant "made no showing that the trial court's limitation of the cross examination of [the expert] could have improperly influenced the jury's verdict." *Id.* This Court further noted that "although the evidence . . . was not excluded by [Rule 412], . . . the trial court nevertheless did not abuse its discretion in refusing to permit defendant from introducing such evidence because there is no indication in the record that [the] evidence was relevant to [the complainant's] credibility." *Id.* at 667, 556 S.E.2d at 676.

We find the present case distinguishable. In both *Bass* and *Yearwood*, the evidence excluded was evidence of sexual abuse of the complainants occurring years earlier. Furthermore, this Court's holding in *Yearwood* was primarily based on the fact that "there was abundant evidence, even without the testimony of [the expert], that [the complainant] had been sexually assaulted." *Id.* at 666, 556 S.E.2d at 675. In this case, the evidence was not evidence of prior sexual abuse but evidence that A.P. was discovered watching a pornographic video, which defendant sought to introduce to explain an alternative source of A.P.'s sexual knowledge. Without the evidence suggesting an alternative source of A.P.'s sexual knowledge in this case, it is likely the jury concluded A.P.'s allegations were true because A.P. was a critical witness against defendant and there was no known basis from which she could have had the knowledge to fabricate the allegations.

Although there is no controlling case law specific to pornography evidence, we find cases from North Carolina and other jurisdictions persuasive. In *State v. Guthrie*, this Court granted the defendant a new trial upon holding the trial court erred in limiting cross-examination of the victim about a letter she voluntarily wrote to a school friend requesting sex. *Guthrie*, 110 N.C. App. 91, 428 S.E.2d 853 (1993). This Court explained that the testimony regarding the sexually suggestive letter was not the type of evidence which Rule 412 seeks to exclude because the letter was not evidence of sexual activity, but evidence of language. *Id.* at 93, 428 S.E.2d at 854. "Therefore, [the] testimony concerning the letter [was] not deemed irrelevant by Rule 412 and was improperly excluded on that basis." *Id.* at 94, 428 S.E.2d at 854. More closely analogous to this case, in *People v. Mason*, the Illinois Appellate Court, Fourth District, held the Illinois' Rape Shield Statute, which is similar to North Carolina's, did not bar the admission of evidence that a seven year old victim had viewed sexually explicit videotapes. *Mason*, 578 N.E.2d 1351, 1353 (Ill. App. 4 Dist. 1991). In so holding, the court explained:

that the rape-shield statute does not [bar the evidence]
for two reasons. First, the rape-shield statute applies to

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“prior sexual activity” or “reputation.” The viewing of pornographic videotapes by a curious seven year old does not constitute evidence of either. Second, the policies behind the rape-shield statute were the prevention of harassment and humiliation of victims and the encouragement of victims to report sexual offenses. Those policies cannot justify denying a defendant the right to refute evidence which tends to establish sexual abuse took place. The right to confront and call witnesses on one’s own behalf are essential to due process.

Id. (internal citation omitted).

Considering *Guthrie* and *Mason*, we now hold the evidence that A.P. was discovered watching a pornographic video, without anything more, is not evidence of sexual activity barred by the Rape Shield Statute. Although Rule 412 is applicable in trials involving charges of rape and sex offense, we do not believe it was intended to exclude this type of evidence. Moreover, this evidence was relevant to explain an alternative source of A.P.’s sexual knowledge, from which she could have fabricated the allegations.

The only way this evidence would be excluded is under a proper Rule 403 analysis. Under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” N.C. Gen. Stat. § 8C-1, Rule 403 (2013). There is no indication the trial court excluded the evidence of A.P. watching the pornographic video in this case based on Rule 403.

Additionally, we hold defendant was prejudiced by the exclusion of the evidence because A.P. was a key witness in the case against defendant and attacking her credibility was central to defendant’s defense. Because it is unlikely a child A.P.’s age would have sufficient sexual knowledge to make accusations such as those in this case absent actual abuse, the evidence that A.P. was discovered watching a pornographic video was important to explain an alternative basis for A.P.’s sexual knowledge. Excluding the evidence limited defendant’s defense.

Prior Inconsistent Statements

[2] On appeal, defendant also contends the trial court erred in excluding evidence of A.P.’s prior allegations and inconsistent statements about sexual assaults committed by two young boys living in the house as irrelevant under Rule 412. Although we reverse defendant’s conviction

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based on the first issue, we address the merits of this second argument because the issue is likely to recur.

Defendant primarily relies on the following three cases in support of his argument that the trial court erroneously excluded evidence of A.P.'s prior allegations and inconsistent statements: *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982), *State v. Ginyard*, 122 N.C. App. 25, 468 S.E.2d 525 (1996), and *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982). In each of those cases, this State's appellate courts granted new trials to defendants convicted of sexual offenses because the trial courts excluded evidence of prior allegations and inconsistent statements by the alleged victims that the defendants proffered for impeachment purposes. *See e.g., Younger*, 306 N.C. at 697, 295 S.E.2d at 456) (Applying a prior version of the Rape Shield Statute, the Court recognized "[w]e have repeatedly held that prior inconsistent statements made by a prosecuting witness may be used to impeach his or her testimony when such statements bear directly on issues in the case. It is our belief that the statute was not designed to shield the prosecutrix from the effects of her own inconsistent statements which cast a grave doubt on the credibility of her story. . . . In other words, the statute was not intended to act as a barricade against evidence which is used to prove issues common to all trials. Inconsistent statements are, without a doubt, an issue common to all trials.") (internal citations omitted). Upon review of those cases, we agree the trial court erred in this case.

As this Court has recognized,

[T]he "rape shield statute . . . is only concerned with the sexual activity of the complainant. Accordingly, the rule only excludes evidence of the actual sexual history of the complainant; it does not apply to false accusations, or to language or conversations whose topic might be sexual behavior." Therefore, false accusations do not fall under the ambit of Rule 412 and are admissible if relevant.

In re K.W., 192 N.C. App. 646, 650, 666 S.E.2d 490, 494 (2008) (quoting *State v. Thompson*, 139 N.C. App. 299, 309, 533 S.E.2d 834, 841 (2000)) (emphasis and alterations omitted). Accordingly, the trial court's determination in this case that A.P.'s prior allegations and inconsistent statements were "covered by Rule 412" was error. Although these statements involve the mention of sexual behavior, A.P.'s prior allegations and inconsistent statements are not within the purview of Rule 412 and may be admissible to attack A.P.'s credibility.

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We do not, however, hold the statements necessarily should have been admitted into evidence at trial. As the Court indicated in *Younger*, “the relevance and probative value . . . must be weighed against [the] prejudicial effect.” *Younger*, 306 N.C. at 697, 295 S.E.2d at 456. Thus, whether A.P.’s prior allegations and inconsistent statements come into the evidence at trial should be determined on retrial subject to a proper Rule 403 analysis.

Cumulative Error

In the event we held neither of the evidentiary errors standing alone was sufficient to warrant a new trial, defendant argues the cumulative effect of the errors deprived him of a fair trial. Since we reverse and remand for a new trial on both of the evidentiary issues, we need not further address the effect of cumulative error.

III. Conclusion

For the reasons discussed above, we hold the trial court erred in excluding the evidence that defendant discovered A.P. watching a pornographic video and erred in determining A.P.’s prior allegations and inconsistent statements were irrelevant under Rule 412. Thus, we grant defendant a new trial.

NEW TRIAL.

Chief Judge McGEE and Judge DIETZ concur.

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TOTAL RENAL CARE OF NORTH CAROLINA, LLC, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION
OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT

AND

BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC., RESPONDENT-INTERVENOR

No. COA14-1076

Filed 18 August 2015

**1. Hospitals and Other Medical Facilities—certificate of need—
competing applications—same service area—deference
to agency**

In an action involving two certificate of need applications to provide dialysis stations, the Court of Appeals deferred to the Department of Health and Human Services' interpretation of "similar proposals within the same service area" where that interpretation was reasonable and a permissible construction of the applicable statute. There were more regulatory hurdles to overcome in moving dialysis stations from one county to another than in moving stations within the same county, and the agency created categories for each. Under the deferential standard of review, the agency's schedules and review categories satisfied the statutory requirement that "similar proposals in the same service area" be reviewed together.

**2. Hospitals and Other Medical Facilities—certificate of need—
competing applications—review periods**

In an action involving two applications for certificates of need for dialysis stations, the Department of Health and Human Services properly interpreted its own regulations concerning review periods. Reviews for each category of application lasted several months and there was overlap between the review periods in this case. In the agency's view, overlapping review periods were simply overlapping review periods, not the same review period.

**3. Hospitals and Other Medical Facilities—certificates of need—
review process—constitutional requirements**

In a certificate of need action involving two applications for dialysis stations, the review process established by the General Assembly satisfied the requirements of *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327, 333 (1945).

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4. Hospitals and Other Medical Facilities—certificate of need—findings by ALJ—supported by substantial evidence

In a certificate of need case involving two applications for additional dialysis stations, a series of challenged findings by the administrative law judge (ALJ) were supported by substantial evidence and the court could not substitute its judgment for that of the ALJ.

Appeal by petitioner from final decision entered 23 June 2014 by Administrative Law Judge Craig Croom in the Office of Administrative Hearings. Heard in the Court of Appeals 3 March 2015.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Lee M. Whitman, and Tobias S. Hampson, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for respondent-appellee.

Smith Moore Leatherwood LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for respondent-intervenor-appellee.

DIETZ, Judge.

This appeal challenges the process by which the Department of Health and Human Services determines whether two certificate-of-need applications are “competitive,” meaning they must be reviewed together.

The certificate of need law directs DHHS to “establish schedules for submission and review of completed applications” and further directs that “[t]he schedules shall provide that applications for similar proposals in the same service area will be reviewed together.” N.C. Gen. Stat. § 131E-182(a) (2013). The agency also promulgated its own regulation stating that applications must be reviewed together if “the approval of one or more of the applications may result in the denial of another application reviewed in the same review period.” 10A N.C. Admin. Code 14C.0202(f) (2013).

As part of the 2013 State Medical Facilities Plan, DHHS determined that Franklin County needed 10 additional dialysis stations. Petitioner Total Renal Care of North Carolina, LLC (TRC) and Respondent-Intervenor Bio-Medical Applications of North Carolina, Inc. (BMA) both applied to fill this need.

This case arose because the two companies did *not* file their applications in the same “review period.” BMA proposed moving ten existing

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dialysis stations from Wake County to Franklin County and, under the schedules established by the agency, was required to file its application on 15 March 2013. TRC proposed moving two dialysis stations from Wake County and another eight stations from a different site within Franklin County. Because TRC's application involved moving stations both from another county and from within the same county, TRC *could* have filed its application on 15 March 2013, but it also could wait and file it in a separate review period beginning 15 April 2013. TRC chose the latter. As a result, the agency's schedules did not treat the two applications as "similar proposals for the same service area," and thus the agency did not review them together. On appeal, TRC argues that DHHS's failure to review the applications together violates the certificate-of-need statute, the agency's own regulations, and TRC's due process rights.

As explained below, we reject these arguments. Our precedent requires us to defer to the agency's reasonable interpretation of an ambiguous statute and to an agency's interpretation of its own rules and regulations. In the context of medical services, the statutory term "similar proposals" is ambiguous. Medical services that appear "similar" to a layperson (or an appellate judge) might be entirely dissimilar to experts in the field. That is precisely why the General Assembly tasked DHHS, the state agency with expertise in this area, with determining what is, and is not, a similar proposal. Because we conclude that the agency's interpretations of the statute and its regulations are reasonable, we must defer to those interpretations. Accordingly, we affirm the final decision of the Office of Administrative Hearings.

Facts and Procedural Background

In January 2013, the Department of Health and Human Services published its Semiannual Dialysis Report, identifying a need for ten additional dialysis stations in Franklin County. DHHS publishes this report in January and July of each year as part of its State Medical Facilities Plan, cataloguing surpluses and deficits of stations by county and forecasting the number of stations that will be needed to serve dialysis patients in the future.

Private providers seeking to fill a deficit of medical facilities in our State must apply for and obtain "certificate of need" approval. N.C. Gen. Stat. § 131E-178(a); *see also id.* § 131E-176(16). The Certificate of Need Section of DHHS reviews all certificate of need applications for conformity with the statutory review criteria set forth in the applicable statute. *Id.* § 131E-183(a). To facilitate this process, the statute authorizes DHHS

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to adopt rules governing the orderly administration of certificate of need applications. *See, e.g., id.* §§ 131E-177(1); 131E-182.

The statute requires the agency to establish review schedules under which “similar proposals in the same service area will be reviewed together.” *Id.* § 131E-182(a). Additionally, the agency’s review is limited to a period of 90 days,¹ starting “on the day established by rule as the day on which applications for the particular service in the service area shall begin review.” *Id.* § 131E-185(a1).

As the statute instructs, the agency has adopted schedules setting forth deadlines for the filing and review of various categories of medical services. *See* 10 N.C. Admin. Code 14C.0202(e). These categories and filing dates are contained in the State Medical Facilities Plan each year, and applicants must comply with the filing deadlines to ensure consideration in any particular period of review. *Id.*; *see also id.* § 14C.0203(a)-(b) (mandating that the agency “shall not . . . review[]” applications unless they are “filed in accordance with this Rule”).

The categories relevant to this appeal are Category D and Category I. Category D includes applications proposing the “relocation of existing certified dialysis stations *to another county* pursuant to Policy ESRD-2.” N.C. Dep’t of Health & Human Servs., Div. of Health Serv. Regulation, Med. Facilities Planning Branch, *North Carolina 2013 State Medical Facilities Plan*, N.C. Dep’t of Health & Human Servs., 18 (January 1, 2013), <http://www.ncdhhs.gov/dhsr/ncsmfp/2013/2013smfp.pdf>. (emphasis added). Policy ESRD-2, which governs dialysis services, permits an applicant to relocate dialysis stations into a contiguous county only if there is a surplus in the “giving” county and a deficit in the “receiving” county. *Id.* at 36. Category I, on the other hand, covers applications seeking to relocate existing certified dialysis stations *within the same county*. *Id.* at 20.

On 15 March 2013, BMA submitted its application to develop a ten-station dialysis facility in Louisburg, Franklin County. BMA’s application proposed moving ten dialysis stations from two of its existing facilities in Wake County, which is contiguous to Franklin County. As a result, BMA’s application fell within Category D. *See id.* at 18. BMA timely submitted

1. The statute provides that the Agency “may extend the review period for a period not to exceed 60 days and provide notice of such extension to all applicants.” N.C. Gen. Stat. § 131E-185(c); *see also* 10A N.C. Admin. Code 14C.0205(b) (“Except in the case of an expedited review, the period for review may be extended for up to 60 days by the agency if it determines that . . . it cannot complete the review within 90 days.”).

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its proposal by the deadline for Category D applications, as set forth in the State Medical Facilities Plan, to be reviewed in the period beginning 1 April 2013. *Id.* at 21-22.

One month later, on 15 April 2013, TRC submitted its application to develop a ten-station dialysis facility in Youngsville, Franklin County. Unlike BMA, which did not have an existing facility in the county, TRC proposed moving eight stations from its existing facility within Franklin County. TRC also proposed moving two additional stations from one of its facilities in Wake County, for a total of ten stations. Because TRC's application involved moving stations both from another county and from within Franklin County, TRC's application met the criteria of both a Category D and a Category I application. TRC missed the deadline for Category D applications but timely submitted its proposal by the deadline for Category I applications, to be reviewed in the period beginning on 1 May 2013.² *Id.*

Nearly a month after filing its application, on 13 May 2013, TRC submitted a letter to the agency requesting that it conduct a competitive review of the BMA and TRC applications. In a competitive review, the agency undergoes a two-step process: first, it reviews each application standing alone for conformity with the applicable review criteria, standards, and plans; and second, it compares the applications against each other to determine which is comparatively superior and therefore will be approved. *See Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995). The agency designates applications as competitive "if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period." 10A N.C. Admin. Code 14C.0202(f) (emphasis added).

The agency determined that BMA and TRC submitted applications in different review periods and therefore declined to review the applications competitively. On 27 August 2013, the agency issued a decision approving BMA's application, thereby eliminating the ten-station deficit

2. DHHS envisioned there would be times when applications fell into more than one category. The State Medical Facilities Plan requires that "[f]or proposals which include more than one category, an applicant must contact the Certificate of Need Section prior to submittal of the application for a determination regarding the appropriate review category or categories and the applicable review period in which the proposal must be submitted." *Id.* at 18. TRC conceded at oral argument that it did *not* contact the agency regarding the appropriate review category for its application and that it missed the deadline for filing a Category D application.

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identified in the State Medical Facilities Plan. The following month, on 25 September 2013, the agency issued its decision denying TRC's application. The agency determined that TRC's application could not be granted because the ten-station deficit had been eliminated by the approval of BMA's earlier application and, therefore, TRC's proposal to relocate two stations from Wake County to Franklin County would result in a surplus of two stations in Franklin County in violation of the State Medical Facilities Plan.

TRC then initiated a contested case before the Office of Administrative Hearings. The administrative law judge (ALJ) granted BMA's motion to intervene. On 23 June 2014, the ALJ entered partial summary judgment concluding that the agency did not err in declining to review the two applications competitively. That same day, the ALJ entered a final decision concluding that BMA's application conformed to the applicable review criteria. The ALJ therefore upheld the agency's decision. TRC timely appealed to this Court.

Analysis

On appeal, TRC argues that the ALJ erred in affirming the agency's decision because (1) the agency failed to conduct a competitive review of the TRC and BMA applications, substantially prejudicing TRC's rights, and (2) the agency erroneously approved BMA's application. For the reasons set forth below, we reject TRC's arguments and affirm the ALJ's final decision.

I. Requirement of Competitive Review

a. Compliance with the Statute

[1] TRC first argues that the agency violated Section 131E-182(a) of the General Statutes when it reviewed BMA's application in an earlier, separate review period from TRC's application.

Section 131E-182(a) directs the Department of Health and Human Services to "establish schedules for submission and review of completed applications" and further directs that "[t]he schedules shall provide that applications for similar proposals in the same service area will be reviewed together." TRC argues that the statutory term "similar proposals in the same service area" is unambiguous, and under its plain meaning the two companies' applications were similar proposals in the same service area. Thus, because the schedules established by the agency caused those two applications to be reviewed at different times, TRC contends the agency violated the statute. For the reasons discussed

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below, we reject this argument and hold that the agency's schedules comply with the statute.

The interpretation of a statute is a question of law and thus is reviewed *de novo* in an administrative appeal. N.C. Gen. Stat. § 150B-51 (2013). But because this statute instructs a state agency to promulgate regulations to administer it, there is an additional layer of review. If the statutory language is unambiguous and the statutory intent clear, this Court must give effect to that unambiguous language regardless of the agency's interpretation. *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, 771 S.E.2d 537, 549 (2015). But if the statute is silent or ambiguous on an issue, this Court must defer to the agency's interpretation "as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Id.* at ___, 771 S.E.2d at 543.

Here, the statute does not define "similar proposals for the same service area" and we do not believe that term is so plainly unambiguous that the agency has no role in determining what is and is not a "similar proposal." For example, one hospital's request to purchase an MRI scanner and another's request to purchase a CT scanner or PET scanner could be viewed as "similar proposals" in the sense that both providers are requesting medical imaging technologies used to diagnose medical conditions. But those applications also could be viewed as entirely dissimilar proposals because they concern different types of medical scanning technology used for different diagnostic purposes. Indeed, medical services that appear entirely "similar" to a layperson may be quite dissimilar to a medical expert. Because the term "similar proposals" with regard to healthcare services is open to multiple interpretations, we hold that the Department of Health and Human Services is entitled to deference in interpreting its meaning. *AH N.C. Owner LLC*, ___ N.C. App. at ___, 771 S.E.2d at 543. As a result, our role is to determine if the agency's interpretation is reasonable and a permissible construction of the statute. *Id.*

To ensure that its schedules "provide that applications for similar proposals in the same service area will be reviewed together," the agency created "categories" of medical services and corresponding review periods that are listed in the applicable State Medical Facilities Plan. *See* 10A N.C. Admin. Code 14C.0202(e). Relevant here, the agency created a category, Category D, that includes all proposals to move dialysis stations from one county to another, contiguous county. A separate category, Category I, covers proposals to move dialysis stations to a new location within the same county. *See* 2013 SMFP at 18-20.

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An agency official testified about why the agency created these two distinct categories. The official explained that the State Medical Facilities Plan examines needs based on counties. Proposals to transfer dialysis stations across county lines, which fall under Category D, affect need assessments for both the county losing the facilities and the county gaining them. As a result, there are more regulatory hurdles to overcome before dialysis stations may be moved from one county to another. *See id.* at 36.

By contrast, proposals to relocate dialysis stations within the same county, which fall under Category I, have no impact on overall county need assessments because the number of certified stations in that county will remain the same. As a result, proposals to move stations within the same county have fewer implications under the State Medical Facilities Plan and thus fewer regulatory hurdles to overcome.

In light of these distinctions, the agency concluded that Category D and Category I proposals are not “similar proposals in the same service area” and need not be reviewed together. The 2013 review schedule established by the agency in the State Medical Facilities Plan reflects this determination. For the health service area that includes the counties at issue in this case, Category D applications are not reviewed in the same review period as Category I applications.

Under the deferential standard of review applicable here, we must conclude that the agency’s schedules and review categories satisfy the statutory requirement that “similar proposals in the same service area” be reviewed together. The agency provided an explanation of why proposals seeking to move dialysis stations across county lines are not “similar” to proposals merely relocating stations within a county under the medical plan established by state regulators. Because the agency’s interpretation of “similar proposals within the same service area” is reasonable, and a permissible construction of the statute, we are required to defer to that interpretation. *See AH N.C. Owner LLC*, ___ N.C. App. at ___, 771 S.E.2d at 543. Accordingly, we reject TRC’s statutory argument.

b. Compliance with the Applicable Regulations

[2] TRC next contends that the agency’s schedules with respect to dialysis services violate its own regulations, which require that applications must be reviewed together if the agency determines “that the approval of one or more of the applications may result in the denial of another application *reviewed in the same review period.*” 10A N.C. Admin. Code 14C.0202(f) (emphasis added). It is undisputed here that approving one of the parties’ applications may have resulted in denial of the

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other application. TRC argues that the two applications were “reviewed in the same review period” because the time frame in which Category D and Category I applications were reviewed overlapped. Thus, TRC argues that the agency’s own regulations required it to review the two applications simultaneously. For the reasons discussed below, we reject this argument and hold that the agency properly interpreted its own regulations.

An administrative agency’s interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulation’s plain text. *York Oil Co. v. N.C. Dep’t of Env’t*, 164 N.C. App. 550, 554-55, 596 S.E.2d 270, 273 (2004). Here, the agency interprets the term “review period” to mean the specific time frame in which a particular category of applications are reviewed. Because reviews for each category last several months, there is overlap between these review periods—here for example, while the agency was still reviewing its Category D applications, it began receiving Category I applications, the filing deadline for which was one month later. But the agency does not consider those Category I applications to be filed in the same “review period” as the Category D applications. In the agency’s view, *overlapping* review periods are not the *same* review period, they are simply overlapping review periods.

As with TRC’s statutory argument, we are constrained to reject TRC’s regulatory argument under the deferential standard of review. The agency’s interpretation “is neither plainly erroneous nor inconsistent with the regulation.” *Id.* When one speaks of a “review period,” it is certainly permissible to interpret that phrase as a distinct period of time, with a beginning and an end, as the agency does here, and to treat proposals as being in different “review periods” if they have some overlap in time frame but are not reviewed entirely at the same time from beginning to end. This is particularly true with respect to this regulatory regime, where the agency has established categories for different types of proposals, with different filing deadlines for each category. Accordingly, we reject TRC’s regulatory argument.

c. Constitutionality of Review Categories and Schedules

[3] Finally, TRC argues that failing to review its application with BMA’s application violates its due process rights, citing the U.S. Supreme Court’s decision in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327, 333 (1945). In *Ashbacker*, which involved federal statutes and regulations, the U.S. Supreme Court held that “where two *bona fide* applications are mutually exclusive the

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grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.” *Id.* Although *Ashbacker* did not directly reference constitutional principles, some courts have suggested the opinion is grounded in due process principles. *See, e.g., Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 349 F.2d 587, 590 (10th Cir. 1965).

Even if we assume *Ashbacker* imposes a constitutional requirement that certain administrative applications submitted to state agencies be reviewed simultaneously by that agency, TRC’s argument fails because this Court previously has held that the statutory review process established by the General Assembly satisfies the requirements of *Ashbacker*. *See Britthaven*, 118 N.C. App. at 384-85, 455 S.E.2d at 460. Because, as explained above, the agency’s review categories do not violate the statute, and ensure that “similar proposals” are reviewed together, those categories also satisfy whatever due process requirements are encapsulated in *Ashbacker*. Accordingly, we reject TRC’s argument.

II. Agency’s Final Decision

[4] TRC next argues that a series of findings by the administrative law judge are not supported by the record.

We review a challenge to the ALJ’s findings to determine whether the findings are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b), (c). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Surgical Care Affiliates v. N.C. Dep’t of Health & Human Servs.*, ___ N.C. App. ___, ___, 762 S.E.2d 468, 470 (2014) (internal quotation marks omitted). Even if the record contains evidence that could also support a contrary finding, we may not substitute our judgment for that of the ALJ and must affirm if there is substantial evidence supporting the ALJ’s findings. *Id.*

a. Criterion 5

TRC first argues that the ALJ erred in concluding that BMA’s application satisfied N.C. Gen. Stat. § 131E-183(a)(5) (Criterion 5). Criterion 5 requires, in relevant part, that an applicant demonstrate the long-term financial feasibility of its proposed project based upon reasonable projections of costs and charges for services. *See id.* TRC maintains that BMA’s projected payor mix for home hemodialysis services was unreasonable, and therefore its proposal is inconsistent with Criterion 5. We reject this argument because the ALJ’s findings are supported by substantial evidence.

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An applicant's anticipated "payor mix" refers to the breakdown in the percentage of total projected dialysis treatments for which the applicant expects to be reimbursed by each payor category, including, for example, Medicare, Medicaid, and commercial insurance. In its application, BMA projected to serve 34 in-center patients, four home hemodialysis patients, and four home peritoneal dialysis patients by the end of the second operating year. With respect to the four home hemodialysis patients, BMA projected that commercial insurance would reimburse 87% of treatments. TRC contends that BMA grossly overestimated this percentage, and "[t]he high levels of projected commercial reimbursement served to inflate BMA's revenue projections." Thus, TRC argues, BMA's application was nonconforming with Criterion 5.

Substantial evidence in the record supports the ALJ's conclusion that BMA's proposed payor mix was reasonable and satisfied Criterion 5. There is detailed evidence and testimony in the administrative record regarding the reasonableness of BMA's projected reimbursements for services. At the hearing, BMA identified trends suggesting higher use of home hemodialysis by commercially insured patients, and witnesses for all parties agreed that working people tend to prefer home hemodialysis and also are more likely to have commercial insurance coverage. This evidence is sufficient for a reasonable mind to accept BMA's projected payor mix and therefore constitutes substantial evidence. *Surgical Care Affiliates*, ___ N.C. App. at ___, 762 S.E.2d at 470.

b. Criterion 4

TRC next challenges the ALJ's finding that BMA satisfied N.C. Gen. Stat. § 131E-183(a)(4) (Criterion 4) "[b]ecause the BMA Application did not demonstrate conformity with Criterion 5." This argument turns entirely on TRC's success in its challenge to Criterion 5. Because we reject that argument, we likewise reject this argument.

c. Criterion 13c

Finally, TRC argues that BMA's application does not satisfy N.C. Gen. Stat. § 131E-183(a)(13)c (Criterion 13(c)). Criterion 13(c) requires an applicant to demonstrate that "the elderly and the medically underserved groups . . . will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services." *Id.* TRC contends that the ALJ should have adopted the view of its expert witness, who testified that "Medicaid patients would [not] have adequate access to home hemodialysis and peritoneal dialysis, because BMA projected lower utilization for these services by

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medically underserved patients, as compared to its projections of utilization for in-center services by these patients.”

The ALJ’s decision on this issue is supported by substantial evidence. BMA provided data and projections showing an expected 91% of its in-center patients would be drawn from underserved populations. BMA also showed that it would provide services to all patients without regard to income, race or ethnicity, gender, ability to pay, or any other factor that would classify a patient as underserved. Relying on this record evidence, the ALJ made detailed findings about BMA’s compliance with Criterion 13(c). Because this evidence is sufficient for a reasonable mind to accept BMA’s projections, the ALJ’s findings are supported by substantial evidence and we must reject TRC’s argument.

Conclusion

We affirm the final decision of the Office of Administrative Hearings.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 AUGUST 2015)

STATE V. BENTON No. 13-1204-2	Guilford (12CRS74220)	Affirmed
CARTER NEIGHBORS LTD. v. EDWIN RECTOR 1995 CHARITABLE TR. No. 14-1212	Catawba (12CVS47)	Dismissed
ELLIS v. KEY CITY FURN., INC. No. 15-78	N.C. Industrial Commission (W14258)	Affirmed
IN RE A.W. No. 15-167	Transylvania (11JA6) (14JA19) (14JA20)	Affirmed
IN RE K.L. No. 15-349	Cumberland (14JA12) (14JA13)	Affirmed in part; remanded in part.
IN RE L.B.B. No. 15-164	Harnett (13JA29)	Affirmed
IN RE N.R.C. No. 15-291	Beaufort (12JA34) (12JA35) (13JA13)	Dismissed in part; Affirmed in part.
IN RE V.D. No. 15-226	Orange (13JT97)	Affirmed
NEWELL v. JAMES E. ROGERS, P.A. No. 14-1412	Northampton (11CVS147)	Affirmed
STATE v. ALARCON No. 14-1147	Union (10CRS56091-92) (11CRS51036)	No Error
STATE v. BROWN No. 14-1190	New Hanover (04CRS58275)	No Error
STATE v. GRAHAM No. 14-1260	Craven (12CRS50304) (12CRS50323) (12CRS508-09) (13CRS1244-45)	No Prejudicial Error

STATE v. MOORE
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Mecklenburg
(11CRS229597)
(11CRS229821)

No Error

STATE v. PATEL
No. 14-1120

Gaston
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(13CRS50588)

No Prejudicial Error

STATE v. YOUNG
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(12CRS254000)

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Interlocutory orders and appeals—ecclesiastical matters immediately appealable—Where the trial court's denial of a Rule 12(b)(1) motion to dismiss could result in the trial court becoming entangled in ecclesiastical matters, such an interlocutory order is immediately appealable. **Davis v. Williams, 262.**

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Jurisdiction—writ of certiorari—sua sponte order granting motion for appropriate relief—bound by petition panel—The Court of Appeals had jurisdiction to review the trial court's sua sponte order granting defendant appropriate relief via writ of certiorari. The motion for appropriate statute addressed by the Supreme Court in *Stubbs*, ___ N.C. ___ (2015), was not instructive and absent direction otherwise the Court of Appeals was bound by the decision of the petition panel in this case. **State v. Thomsen, 475.**

Notice of appeal—timeliness—service requirements—Plaintiff wife's motion to dismiss defendant husband's appeal in an alimony and child support case as untimely was denied. Defendant's failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure required application of Rule 3(c)(2) and not Rule 3(c)(1). Thus, defendant's notice of appeal was timely filed within thirty days of defendant receiving the trial court's order. **Juhnn v. Juhnn, 58.**

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Preservation of issues—issue not raised below—A discharged employee who brought an Employment Security Division proceeding failed to preserve any challenge to the consideration of a witness's written statement by not objecting to its introduction at the hearing before the appeals referee. Petitioner could have raised a hearsay argument for correction before the appeals referee, when all the evidence in this matter was collected, and not at the various levels of review. **Jackson v N.C. Dep't of Com. Div. of Emp't Sec., 328.**

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Motion to stay action—motion to compel—sufficiency of findings of fact—The trial court erred by denying defendants' motion to dismiss and alternative motion to stay action pending arbitration and to compel arbitration. The trial court failed to make any of the requisite findings of fact or conclusions to show: (1) whether the parties had a valid agreement to arbitrate; and (2) whether this matter fell within the scope of that agreement. **Earl v. CGR Dev. Corp., 20.**

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plaintiff argued that the claim for punitive damages was factually and legally distinct from other claims. Apportionment of fees between the punitive damages claim and the underlying claims was unnecessary; the trial court found that plaintiff's claims arose from a common legal and factual nucleus, that the allegations in support of plaintiff's claim for punitive damages were central to defendants' liability for all the claims, and that apportionment of legal fees between the claims was impractical. **Philips v. Pitt Cnty. Mem'l Hosp., Inc.**, 456.

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Zion Baptist Church bylaws. However, the trial court erred by denying defendants' motion to dismiss plaintiffs' claims against the church pastor for conversion and embezzlement/obtaining property by false pretenses. Although our courts may use neutral principles of law to resolve disputes concerning whether a church followed its bylaws, the Constitution requires courts to defer to the church's internal governing body with regard to ecclesiastical decisions concerning church management and use of funds. **Davis v. Williams, 262.**

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Impact fees—illegally imposed—voluntarily returned—interest—Defendant was entitled to recover interest on an impact fee that was illegally required by defendant-town of plaintiff-developer. Defendant argued that the fee was voluntarily returned and was not the subject of an underlying judgment entered against defendant, so that plaintiffs were barred from bringing their claim for interest. However, the plain language of N.C. Gen. Stat. § 160A-363(e) neither prevents a claim for interest when the city returns the principal amount to a claimant nor bars a claim for interest that arises from a separate civil action. **China Grove 152, LLC v. Town of China Grove, 1.**

Impact fees—interest—The trial court's legal conclusion that defendant must return an impact fee plus interest was affirmed. Following *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, China Grove's Adequate Public Facilities Ordinance was invalid as a matter of law. **China Grove 152, LLC v. Town of China Grove, 1.**

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Service—alias and pluries summons—Secretary of State—In an action for breach of contract and unjust enrichment, the trial court did not err by denying defendant's motion to set aside the default judgment due to the Secretary of State mailing the alias and pluries summons to defendant's registered address rather than defendant's principal address. Service was effective when the alias and pluries summons was served on the Secretary of State. **Builders Mut. Ins. Co. v. Doug Besaw Enters., Inc., 254.**

Two dismissal rule—same transaction or occurrence against different defendants—The Industrial Commission did not err in a case arising from an incident,

CIVIL PROCEDURE—Continued

where decedent used a deputy's gun at a hospital to shoot a hospital employee and himself, by granting defendant North Carolina Department of Health and Human Services' (N.C. DHHS) motion for summary judgment based on the "two dismissal" rule under N.C.G.S. § 1A-1, Rule 41(a)(1). The rule can apply to actions with claims arising from the same transaction or occurrence against different defendants. The three actions, including wrongful death and two state tort claims, alleged damages based on the negligent conduct of numerous employees of N.C. DHHS stemming from the 22 July 2005 incident. **Gentry v. N.C. Dep't of Health & Human Servs.**, 424.

CIVIL RIGHTS

42 U.S.C. § 1983—defamation—emeritus professor status denied—The trial court correctly dismissed plaintiff's 42 U.S.C. § 1983 claim resulting from his failure to achieve professor emeritus status. Plaintiff's § 1983 claim presumes that his interest in professor emeritus status is a protected property interest, but property interests are protected only where one has a legitimate claim of entitlement. Plaintiff failed to present sufficient record support or legal authority underlying his alleged property interest, save for a conclusory allegation, which is not accepted as true when reviewing a complaint dismissed under Rule 12(b)(6). **Izydore v. Tokuta**, 434.

42 U.S.C. § 1983—stigma plus claim—denial of emeritus professor status—Plaintiff failed to state a claim upon which relief could be granted arising from his failure to achieve professor emeritus status where he claimed that two professors made allegedly defamatory statements intending to have his nomination denied. Plaintiff brought his claim under 42 U.S.C. § 1983, based on the stigma plus theory. However, as determined above, plaintiff had no legitimate claim to professor emeritus status, and the denial of plaintiff's nomination to the status was not an adverse employment action sufficient to add the "plus" to the reputational stigma of the professors' allegedly defamatory remarks. **Izydore v. Tokuta**, 434.

42 U.S.C. § 1983 denial of professor emeritus status—entity claim—Plaintiff's entity liability claim arising under 42 U.S.C. § 1983 failed where the action arose from his unsuccessful application for professor emeritus status and plaintiff alleged entity liability against the university and the State. Plaintiff failed to identify a protected property or liberty interest sufficient to state a claim under § 1983, and his entity liability claim arising under § 1983 also failed. **Izydore v. Tokuta**, 434.

Complaints to employer—no notice of protected class factors—discharge not retaliation—Petitioner was not terminated in retaliation for her complaints to her employer, in violation of 42 U.S.C. § 2000e, where petitioner failed to put respondent on notice of any relevant factors concerning a protected class, so that respondent had no knowledge that petitioner was engaged in a protected activity and could not have engaged in retaliation. **Robinson v. Univ. of N.C. Health Care Sys.**, 614.

CONSTITUTIONAL LAW

Confrontation Clause—DMV records—not created solely as evidence against defendant—Defendant's right to confrontation was not violated in a prosecution for driving with a revoked license where the trial court admitted defendant's driving record, a document authenticating orders suspending his license and stating that they were mailed to his house, and two orders indefinitely suspending his driving license. None of the records were created for the sole purpose of providing evidence against defendant. **State v. Clark**, 141.

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—direct appeal—On appeal from defendant's guilty plea to two counts of attempted first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the Court of Appeals dismissed without prejudice defendant's argument that his trial counsel rendered ineffective assistance by failing to present any evidence of the similarity between his out-of-state prior conviction and the corresponding North Carolina offense. **State v. Edgar, 624.**

Effective assistance of counsel—failure to raise issue at trial—no prejudice—A defendant charged with not registering a change of address as a sex offender received effective assistance of counsel where his attorney did not preserve for appellate review the issue of the sufficiency of the evidence. Even if the issue had been preserved on those grounds, the evidence presented by the State was sufficient to raise the question of guilt for the jury. **State v. James, 188.**

Effective assistance of counsel—insufficient evidence—In a case involving a Domestic Violence Protective Order, a claim for ineffective assistance of counsel was dismissed (with defendant having the choice of filing a motion for appropriate relief) where the record lacked sufficient evidence to make a determination. **State v. Edgerton, 460.**

Federal preemption—animal welfare—complementary state legislation—The federal Animal Welfare Act (AWA) did not expressly preempt plaintiff's claim from being brought in a North Carolina District Court because the language of the AWA permits the enactment of complementary legislation by the states. **Salzer v. King Kong Zoo, 120.**

Federal preemption—animal welfare—no implicit intent to occupy entire field—Congress could not have implicitly intended to occupy an entire field of regulation when it explicitly afforded states the right to enact cooperative legislation in the same field. **Salzer v. King Kong Zoo, 120.**

Federal preemption—animal welfare—state and federal legislation—not in conflict—The federal Animal Welfare Act (AWA) did not preempt plaintiffs' claim under N.C.G.S. § 19A where the two statutes applied equally and did not conflict so much as operate cooperatively. **Salzer v. King Kong Zoo, 120.**

Miranda rights—waiver—voluntariness—sufficiency of findings of fact—mental condition—police coercion—totality of circumstances—The trial court erred in a felony assault with a firearm on a law enforcement officer case by concluding defendant's waiver of Miranda rights and statements were involuntarily given. The trial court's order was vacated and remanded for new findings of fact, and, if needed, a new hearing. The issues of defendant's mental condition and police coercion must be considered by the totality of the circumstances analysis. **State v. Ingram, 173.**

DAMAGES AND REMEDIES

Punitive—failure of underlying claim—Plaintiff's claim for punitive damages arising from alleged statements made during his unsuccessful nomination for professor emeritus status failed because he did not state an underlying claim upon which relief could be granted. **Izydore v. Tokuta, 434.**

Restitution—amount—injury to property—sufficiency of evidence—The trial court did not err in its restitution order by requiring defendant to pay \$7,408.91.

DAMAGES AND REMEDIES—Continued

There was sufficient evidence to support the trial court's order awarding restitution based on a handyman's invoice. Further, N.C.G.S. § 15A-1340.34 allows a defendant who damages property to be held responsible for all damage directly and proximately caused by the injury to property, including reasonable costs of repair and replacement, especially in a case like this where an air-conditioner was completely inoperable due to defendant's actions. **State v. Hardy, 146.**

DIVORCE

Alimony—child support—bad faith reporting of income—The trial court did not abuse its discretion by its award of child support and alimony. Its findings of fact were based upon competent evidence and supported its conclusions of law that defendant husband had acted in bad faith regarding the reporting of his income. **Juhnn v. Juhnn, 58.**

Alimony—duration—sufficiency of findings—The trial court did not err by awarding plaintiff wife eighteen years of alimony. The trial court made sufficient findings as to the reasons for the amount, duration, and manner of payment. **Juhnn v. Juhnn, 58.**

Alimony—purely contractual agreement—cohabitation—enforcement—In an action for specific performance of defendant's alimony obligations, the trial court did not err by denying defendant's motion for summary judgment. Plaintiff's cohabitation was not a bar to enforcement of the alimony agreement because N.C.G.S. § 50-16.9, which names cohabitation and death as events that terminate court-ordered alimony, does not apply to alimony agreements that are purely contractual. **Patterson v. Patterson, 114.**

Alimony—twenty months' delay entering order—no prejudice—Where defendant husband was not prejudiced by the trial court's delay in entering an order for alimony twenty months after the last hearing, defendant could not show that his constitutional rights were violated. **Juhnn v. Juhnn, 58.**

Equitable distribution order—beneficiary of military benefits—Where decedent disobeyed an equitable distribution order to name plaintiff (his ex-wife) as beneficiary of his military Survivors Benefit Plan and plaintiff thereafter joined third-party defendant (decedent's wife at the time of his death) to the original divorce action, the trial court did not err by entering summary judgment in favor of plaintiff. A prior court order designated plaintiff as beneficiary of the plan, and third-party defendant failed to participate in the action. **Ellison v. Ellison, 386.**

DOMESTIC VIOLENCE

Protective order—dating relationship—less than three weeks—In its domestic violence protective order requiring that defendant have no contact with plaintiff and surrender his firearms for a year, the trial court did not err by concluding that defendant and plaintiff had been in a "dating relationship" for purposes of North Carolina's Domestic Violence Act. Even though their relationship had lasted less than three weeks, the facts of this case satisfied the statutory definition. **Thomas v. Williams, 236.**

Protective order—fear of continued harassment—In its domestic violence protective order requiring that defendant have no contact with plaintiff and surrender his firearms for a year, the trial court did not err by finding that defendant placed

DOMESTIC VIOLENCE—Continued

plaintiff “in fear of continued harassment that rises to such a level as to inflict substantial emotional distress.” The evidence showed that plaintiff was afraid of defendant; defendant repeatedly contacted plaintiff over an extended period of time after she told him to stop; and defendant left plaintiff a threatening voice message after he was arrested. **Thomas v. Williams, 236.**

DRUGS

Amended indictment—identity of controlled substance—essential element of crime—The trial court erred by allowing the State to amend Count One of the indictment charging defendant with possession with intent to manufacture, sell, or deliver a Schedule 1 substance by changing the name of the substance from “Methylethcathinone” to “4-Methylethcathinone.” The identity of the controlled substance is an essential element of the crime. The amendment, which added an essential element, therefore was a substantial alteration and impermissible. The Court of Appeals vacated defendant’s conviction for this charge. **State v. Williams, 361.**

Indictment—possession with intent to manufacture, sell, or deliver a Schedule 1 substance—catch-all provision—The Court of Appeals rejected defendant’s argument that Count Two of the indictment charging him with possession with intent to manufacture, sell, or deliver a Schedule 1 substance was defective. The indictment was not required to state that the substances at issue were Schedule 1 solely by virtue of their conformity with characteristics set forth in the “catch-all” provision of N.C.G.S. § 90-89(5)(j). **State v. Williams, 361.**

Maintaining a dwelling—motion to dismiss—The trial court did not err by denying defendant’s motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. The State presented sufficient evidence that defendant resided at the place where the substance was seized and that the residence was being used for keeping or selling controlled substances. **State v. Williams, 361.**

EMINENT DOMAIN

N.C.G.S. § 136-108 evidentiary hearing—closure of road abutting property—The trial court did not err by concluding that the closure of Dowdle Mountain Road, which abutted defendant’s property, was a lawful exercise of police power and therefore not a compensable taking. Defendant still had access to Dowdle Mountain Road—the property’s access point to the road was simply changed. The change did not restrict access to defendant’s property. **Dep’t of Transp. v. BB&R, LLC, 11.**

EMPLOYER AND EMPLOYEE

Flu shot—disparate treatment—Applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, there was no disparate treatment where plaintiff worked in a skilled nursing and healthcare facility which suffered a flu outbreak, all staff were required to have a flu shot, plaintiff refused and was terminated, and others who refused were not terminated. **Head v. Adams Farm Living, Inc., 546.**

Religious accommodation—flu shot—Defendant employer did not have a legal duty to reasonably accommodate plaintiff’s religious beliefs where plaintiff worked in a skilled nursing and healthcare facility which suffered a flu outbreak and required staff to have a flu shot. Although plaintiff asserted that the duty of reasonable

EMPLOYER AND EMPLOYEE—Continued

accommodation under Title VII of the Civil Rights Act of 1964 should be read into N.C.G.S. § 143-422.2, the North Carolina statute did not impose a corresponding duty of reasonable accommodation by an employer. **Head v. Adams Farm Living, Inc.**, 546.

Unemployment benefits—misconduct—A discharged nursing assistant was disqualified from receiving unemployment benefits where she was discharged for work-related “misconduct”—namely, that she failed to report to a supervising nurse when a resident under her care fell and suffered a broken ankle. Statements and testimony supported the findings by the Board that were contested. **Jackson v. N.C. Dep’t of Com. Div. of Emp’t Sec.**, 328.

ENVIRONMENTAL LAW

Burden of proof—discharge of material—bound by prior decisions—The trial court did not err by placing the burden of proof on petitioner House of Raeford to prove it did not discharge material into Cabin Branch Creek, rather than requiring the North Carolina Department of Environment and Natural Resources to prove the allegations. A panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court. **House of Raeford Farms, Inc. v. N.C. Dep’t of Env’t**, 294.

ESTATES

Attorney fees—determination by clerk of court—The trial court erred in an estate matter by concluding that the clerk of court lacked authority to review an attorney fees petition for reasonableness. The Court of Appeals agreed, however, with the trial court’s determination that the clerk’s order lacked sufficient findings to support its decision as to the amount of attorney fees that were reasonable. The matter was remanded to the clerk of court. **In re Taylor**, 30.

Reimbursement claim for funeral expenses—statutory procedure and deadline—clerk of court’s jurisdiction—On appeal from the trial court’s order vacating an order entered by the clerk of court concerning an estate matter, the Court of Appeals overruled petitioner’s argument that the trial court erred by denying her claim for reimbursement of funeral expenses. Petitioner failed to comply with the statutory procedure and deadline for challenging the denial of her claim for funeral expenses, and the clerk of court did not have jurisdiction to hear the claim. **In re Taylor**, 30.

ESTOPPEL

Applicability of arbitration agreement—other claims—The trial court did not err by not concluding that the N.C. distributor of medical imaging equipment was equitably estopped from denying applicability of an arbitration clause in a distribution agreement to claims for breach of a non-disclosure agreement and for unfair and deceptive practices. The N.C. distributor was not simultaneously denying the enforceability of the arbitration clause in the distribution agreement while also claiming a right under the distribution agreement. **Neusoft Med. Sys., USA Inc. v. Neuisys, LLC**, 102.

EVIDENCE

Caveat—excluded evidence—other evidence admitted—In a caveat to a will where the caveators argued that the trial court erred by excluding testimony about the reason for the decedent's disenchantment with a beneficiary, the jury heard the gist of the challenged testimony, and the admission of additional testimony regarding the reason the decedent removed himself from the Brevard College Board in the late 1980s would not have altered the jury's verdict. **In re Estate of Pickelsimer, 582.**

Challenged evidence—not actually excluded—In a caveat proceeding, there was no merit to the caveators' contention that the trial court erred by excluding testimony as to the decedent's statements that would allegedly shed light on his relationship with his children or on his mental condition. In fact, the challenged statement, "I am not mentally up for it right now," made when the decedent's daughter asked to talk about business matters, was not excluded. **In re Estate of Pickelsimer, 582.**

Failure to appear for insurance examination—awareness of fraudulent claims—In defendant's trial for charges stemming from alleged insurance fraud, it was not plain error for the trial court to admit testimony that defendant had failed to appear for two scheduled examinations under oath required by her insurance policy and had failed to respond to requests to reschedule the examination. This testimony was relevant to show defendant's awareness that she had submitted fraudulent claims. The Court of Appeals rejected defendant's arguments that the testimony violated N.C.G.S. § 14-100(b) and Rule of Evidence 403. **State v. Holanek, 633.**

Findings of fact—abuse of discretion—not considered in analysis—The trial court abused its discretion in a first-degree rape and first-degree sexual offense case by its findings of fact # 21 and # 23 discussing the victim's prior abuse, finding of fact # 77 discussing the victim's lack of "adult supervision," statutory mitigating factor 8(b) indicating the relationship between defendant and the victim was otherwise extenuating; and non-statutory mitigating factor 21(b) discussing the victim's lack of "adult supervision." These findings of fact were not considered in the Court of Appeals' analysis of defendant's Eighth Amendment claim. **State v. Thomsen, 475.**

Hearsay—out-of-court statement of abused child—circumstantial guarantees of trustworthiness—In an action involving the alleged abuse and neglect of children, the out-of-court-statements of one of the children (Eve) had circumstantial guarantees of trustworthiness. Inconsistencies have no bearing on hearsay statements circumstantial guarantees of trustworthiness. In determining that Eve's statements had circumstantial guarantees of trustworthiness, the trial court found that she was unable to testify at trial without hampering her progress in therapy; was motivated to speak the truth to both a DSS social worker and a forensic interviewer; and was competent because she could express herself and understood her duty to tell the truth. **In re M.A.E., 312.**

Hearsay—out-of-court statements of abused child—trauma of testifying—In an action involving the alleged abuse and neglect of children, the trial court did not abuse its discretion by admitting the out-of-court statements of one of the children (Eve) under the residual hearsay exception in Rule 803(24). Although the trial court did not expressly find that Eve was unavailable to testify, the findings were consistent with the testimony of a mental health counselor who recommended that the child not be required to testify due to the resultant confusion, anxiety, and trauma. **In re M.A.E., 312.**

Physician's testimony—general behavior of abused children—There was no plain error in a prosecution for sexual offenses with a child where the trial court

EVIDENCE—Continued

admitted the testimony of a physician that the victim's delay in reporting anal penetration was consistent with the general behavior of children who have been abused in that manner. The physician was the medical director of a family practice program and a board-certified child abuse pediatrician who did not opine on the victim's credibility. **State v. Purcell, 222.**

Prior acts—not more prejudicial than probative—The trial court did not abuse its discretion in a second-degree murder prosecution where evidence of a prior incident was admitted despite an objection under N.C.G.S. § 8C-1, Rule 403. There were significant points of commonality between the Rule 404(b) evidence and the offense charged, and the trial court handled the process conscientiously. Moreover, there was no reasonable possibility that the jury would have reached a different result absent this evidence. **State v. Mangum, 202.**

Prior acts—similarity—The trial court did not err in a second-degree murder prosecution by admitting evidence of an earlier incident where the evidence was sufficiently similar. Prior acts or crimes are sufficiently similar to the crime charged “if there are some unusual facts present in both” incidents. Here, the evidence supported the findings, which supported the conclusions, especially in terms of the relationship between the parties involved, defendant's escalation of the violence in response to being restrained, and the general nature of both incidents. **State v. Mangum, 202.**

Prior acts—temporal proximity—A prior similar event was sufficiently proximate to be introduced into a second-degree murder prosecution where there was a fourteen-month gap between events but there were substantial similarities between the events. The weight of the evidence was to be determined by the jury. **State v. Mangum, 202.**

Prior allegations and inconsistent statements by child—admissible to attack credibility—In an appeal remanded on other grounds, the trial erred by excluding evidence that the prior allegations and inconsistent statements by a child regarding sexual abuse were covered by Rule 412. The statements were not within the purview of Rule 412 and were admissible to attack her credibility. However, whether they should be admitted at retrial was not determined. **State v. Rorie, 655.**

Rape of child—child seen watching pornographic video—evidence excluded—The trial court erred in a prosecution for rape of a child and indecent liberties by excluding evidence that defendant had found the child watching a pornographic video, which defendant had sought to admit to establish an alternate basis for her sexual knowledge. The trial court erred whether it excluded the evidence based on relevance or under Rule 412. Without the evidence suggesting an alternative source of A.P.'s sexual knowledge in this case, it is likely the jury concluded A.P.'s allegations were true because A.P. was a critical witness against defendant and there was no known basis from which she could have had the knowledge to fabricate the allegations. **State v. Rorie, 655.**

Testimony—other witnesses—response to cross-examination—The trial court did not err in a breaking and entering, larceny after breaking and entering, possession of stolen property, and willful and wanton injury to real property case by failing to strike the victim's testimony. Where a witness who has not offered testimony identifying defendant as the perpetrator refers in response to cross-examination to hearsay evidence that “other witnesses” had identified defendant and where a separate witness positively identified defendant during the trial, any error by the trial court in failing to strike the hearsay testimony was not prejudicial. **State v. Hardy, 146.**

FALSE PRETENSE

Indictment—not required to allege “exact misrepresentation”—The indictments charging defendant with obtaining property by false pretenses were not fatally defective for failure to allege the “exact misrepresentation” defendant made to her insurance company regarding moving expenses. The indictments alleged the essential elements of the crimes and the ultimate facts constituting those elements by stating that defendant obtained U.S. currency from State Farm through a false representation she made by submitting a fraudulent invoice which was intended to, and in fact did, deceive State Farm. **State v. Holanek, 633.**

Invoices submitted by defendant—companies did not exist—In defendant’s trial for charges stemming from alleged insurance fraud, the trial court did not err by denying defendant’s motion to dismiss the charges of obtaining property by false pretenses. The State offered substantial evidence that the moving companies on the invoices submitted by defendant to State Farm did not exist, allowing the jury to determine that the invoices were fraudulent. The State was not required to show what happened to the money that defendant obtained from State Farm. **State v. Holanek, 633.**

Jury instructions—failure to comply with contractual obligations of insurance policy—In defendant’s trial for charges stemming from alleged insurance fraud, it was not plain error for the trial court to omit jury instructions regarding N.C.G.S. § 14-100(b). The jury was expressly instructed that, in order to return a guilty verdict, it had to find that defendant had intended to defraud State Farm through her submission of documents containing false representations. No reasonable juror would have thought that defendant could be found guilty based solely on her failure to comply with the contractual obligations of her insurance policy. **State v. Holanek, 633.**

Variance between indictment and evidence—estimate not “invoice”—In defendant’s trial for charges stemming from alleged insurance fraud, defendant received ineffective assistance of counsel because her attorney failed to argue that one count of obtaining property by false pretenses should be dismissed based on a fatal variance between the facts alleged in the indictment and the evidence presented at trial. The indictment referred to a “fraudulent invoice,” while the evidence showed that defendant submitted only an estimate of costs that would be incurred at the pet boarder. Defendant defrauded the insurance company by oral misrepresentation, not by a “fraudulent invoice.” **State v. Holanek, 633.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—competing applications—review periods—In an action involving two applications for certificates of need for dialysis stations, the Department of Health and Human Services properly interpreted its own regulations concerning review periods. Reviews for each category of application lasted several months and there was overlap between the review periods in this case. In the agency’s view, overlapping review periods were simply overlapping review periods, not the same review period. **Total Renal Care of N.C., LLC v. N.C. Dep’t of Health & Human Servs., 666.**

Certificate of need—competing applications—same service area—deference to agency—In an action involving two certificate of need applications to provide dialysis stations, the Court of Appeals deferred to the Department of Health and Human Services’ interpretation of “similar proposals within the same service area”

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

where that interpretation was reasonable and a permissible construction of the applicable statute. There were more regulatory hurdles to overcome in moving dialysis stations from one county to another than in moving stations within the same county, and the agency created categories for each. Under the deferential standard of review, the agency's schedules and review categories satisfied the statutory requirement that "similar proposals in the same service area" be reviewed together. **Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Hum. Servs.**, 666.

Certificate of need—findings by ALJ—supported by substantial evidence—In a certificate of need case involving two applications for additional dialysis stations, a series of challenged findings by the administrative law judge (ALJ) were supported by substantial evidence and the court could not substitute its judgment for that of the ALJ. **Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Hum. Servs.**, 666.

Certificate of need—no-review decision—capable of repetition yet evading review—In an appeal from the dismissal of a contested case against the North Carolina Department of Health and Human Services (DHHS) disputing the decision that a hospital was not required to obtain a new certificate of need, the Court of Appeals held that the Administrative Law Judge erred by dismissing the case as moot. DHHS's discretionary withdrawal of a no-review decision was an action capable of repetition yet evading review. **Cumberland Cty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.**, 524.

Certificate of need—review process—constitutional requirements—In a certificate of need action involving two applications for dialysis stations, the review process established by the General Assembly satisfied the requirements of *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327, 333 (1945). **Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.**, 666.

Certificate of need—temporary reallocation of inpatient and emergency services—In an appeal from the dismissal of a contested case against the North Carolina Department of Health and Human Services (DHHS) disputing the decision that a hospital was not required to obtain a new certificate of need (CON), the Court of Appeals held that the Administrative Law Judge did not err by dismissing the case for failure to state a claim upon which relief could be granted. The hospital was not required to obtain a new CON to reallocate the ratio of inpatient and emergency services on a temporary basis to meet fluctuations in demand because the hospital did not add a new institutional health service, change the scope of services, or fail to materially comply with the existing CON. **Cumberland Cty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.**, 524.

HUNTING AND FISHING

Hunting without a license—evidence sufficient—The evidence was sufficient to show that defendant Pedro was hunting doves without a license where Pedro was holding a shotgun while associating with a group of dove hunters, one of the hunters shot a dove in Pedro's presence, and, although defendant Pedro repeatedly asserted that he was exempt from the hunting license requirement, he did not deny that he was dove hunting. **State v. Oxendine**, 216.

INDICTMENT AND INFORMATION

Change of address as a sex offender—not reported in three days—"business" omitted—indictment sufficient—A superseding indictment for failing to report a

INDICTMENT AND INFORMATION—Continued

change of address as a sex offender was not fatally flawed where it alleged that defendant did not report his change of address within three days rather than three business days. The superseding indictment gave defendant sufficient notice of the charge against him. Moreover, he did not argue that he was in any way prejudiced in preparing his defense by the omission of the word “business.” **State v. James, 188.**

Facially invalid indictments—felonious sale/delivery of controlled substance—failure to name controlled substances in Schedule III—The trial court lacked jurisdiction on three charges of felonious sale/delivery of a controlled substance because the indictments were facially invalid as they did not name controlled substances listed in Schedule III of the North Carolina Controlled Substances Act. Neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are substances that are included in Schedule III. Further, none of these substances are considered trade names for other substances included in Schedule III. **State v. Sullivan, 230.**

Sale and/or delivery of drugs—identity of purchaser—no evidence of prejudice, fraud, or misrepresentation—The trial court did not err by denying defendant’s motion to dismiss the sale and/or delivery charges in case numbers 10 CRS 60224, 10 CRS 60232, 10 CRS 60225, 10 CRS 60233, and 10 CRS 60234 based on his contention that there was a fatal variance between the indictments and the evidence produced during the State’s case-in-chief including that there was no evidence that he sold or delivered a controlled substance to A. Simpson. Neither during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson’s identity or prejudiced by the fact that the indictment identified “A. Simpson” as the purchaser instead of “Cedric Simpson” or “C. Simpson.” There was no evidence of prejudice, fraud, or misrepresentation. **State v. Sullivan, 230.**

JUDGES

One judge ruling after another—partial summary judgment—interpretation—A trial court judge had jurisdiction to enter final judgment against defendant LLC despite an earlier partial summary judgment by another judge as to all plaintiffs except two individuals. Considering the pleadings, issue, facts, and circumstances, the order was ambiguous and properly subject to interpretation by another superior court judge. In light of this ambiguity and the potential injustice of finding meritorious claims inexplicably dismissed before trial, and with deference to the trial court’s interpretation of its own orders, the conclusion that the summary judgment order did not dismiss the claims against the LLC was affirmed. **Faucette v. 6303 Carmel Rd., LLC, 267.**

Reconsideration of interlocutory order—purported change in theory of case—The trial court did not err in denying Neusoft China’s renewed motion to stay litigation in a case involving confidential commercial information. One trial court judge has the authority to reconsider an interlocutory order entered by another trial court judge only in the limited situation where there was a showing of a substantial change in circumstances. In this case, Neusoft China pointed to a change in the theory of the claims; however the purported change in theory was merely a statement of one way that the confidential information was used. **Neusoft Med. Sys., USA Inc. v. Neuisys, LLC, 102.**

JUDGMENTS

Findings and conclusions—distinguished—The trial court’s determinations that the an Adequate Public Facilities Ordinance (APFO) was “illegal” and “not

JUDGMENTS—Continued

specifically authorized by North Carolina law” were conclusions of law, not findings of fact and were reviewed *de novo*. The labels “findings of fact” and “conclusions of law” employed by the trial court in a written order did not determine the nature of the review, nor did the words “found” or “finding” in a statute. The dispositive determination under N.C.G.S. § 160A-363(e) turned on whether the APFO was illegal. Because any determination of legality inherently involves the “application of legal principles,” the trial court’s determinations that the APFO was “illegal” and “not specifically authorized by North Carolina law” were conclusions of law, not findings of fact. **China Grove 152, LLC v. Town of China Grove, 1.**

JURISDICTION

In rem—military benefits—Where decedent disobeyed an equitable distribution order to name plaintiff (his ex-wife) as beneficiary of his military Survivors Benefit Plan and plaintiff thereafter joined third-party defendant (decedent’s wife at the time of his death) to the original divorce action, the trial court did not err by declining to dismiss the third-party complaint for lack of personal jurisdiction over third-party defendant. The subject matter of controversy was property located in North Carolina, giving the trial court in rem jurisdiction. **Ellison v. Ellison, 386.**

Subject matter—negligent supervision of priest—negligent infliction of emotional distress—sexually transmitted disease testing—ecclesiastical matters—motion to dismiss—Plaintiff’s claims for negligent supervision and negligent infliction of emotional distress (NIED) based upon the Diocese defendants’ allegedly negligent supervision of a priest could be resolved through the application of neutral principles of law and, therefore, were not barred by the First Amendment. Plaintiff’s claims for negligence and NIED based on the Diocese defendants’ failure to compel the priest to undergo sexually transmitted disease testing, conversely, would entangle the court in ecclesiastical matters and were dismissed under Rule 12(b)(1). **John Doe 200 v. Diocese of Raleigh, 42.**

JUVENILES

Delinquency—misdemeanor larceny—sufficiency of evidence—The trial court did not err by denying a juvenile’s motion to dismiss charges of misdemeanor larceny and an adjudication of delinquency arising from the theft of a cell phone from a table at a fast food restaurant where defendant contested his identification as the perpetrator. The State presented evidence of the victim, a witness who chased defendant, and several officers, and defendant was found with a spoon from the restaurant as well as two receipts from the restaurant time stamped for around the time of the theft. **In re K.M.M., 25.**

Delinquency—misdemeanor larceny—sufficiency of findings—The trial court made sufficient findings to support adjudicating a juvenile delinquent where it found in the written order that the juvenile had taken an iPhone valued at \$300 from the victim. N.C.G.S. § 7B-2411 does not require any additional findings to support an adjudication of delinquency for misdemeanor larceny. **In re K.M.M., 25.**

Interrogation—right to have parent present—ambiguous request—Where a 16-year-old juvenile asked an interrogating officer, “Can I call my mom?” the trial court’s findings that the juvenile’s request was at best ambiguous and that he never made an unambiguous request to have his mother present were supported by competent evidence. **State v. Saldierna, 347.**

JUVENILES—Continued

Interrogation—right to have parent present—ambiguous request—clarification required—The trial court erred in concluding that the officer complied with the provisions of N.C.G.S. § 7B-2101 in questioning a juvenile where a 16-year-old juvenile asked an interrogating officer, “Can I call my mom?” His request to call his mother was ambiguous, and the officer was required to clarify whether he was invoking his right to have a parent present during the interview. **State v. Saldierna, 347.**

LANDLORD AND TENANT

Eviction action—rent abatement—smoke alarm not operable—The findings fact did not support the trial court’s conclusion that defendant-tenant was entitled to rent abatement under the Residential Rental Agreements Act (RRAA) on a counterclaim to an eviction action. While N.C.G.S. § 42-42(a)(5) and (7) impose upon landlords the duty to provide operable smoke and carbon monoxide alarms, the duty is triggered only if a landlord is notified of the needed repair or replacement, or if it is the beginning of a tenancy. As to the award of rent abatement, the trial court did not articulate its rationale with any specificity. **Stikeleather Realty & Invs. Co. v. Broadway, 507.**

LIBEL AND SLANDER

Remarks by professors—denial of emeritus status—pleading fatally deficient—Plaintiff failed to plead a claim for defamation with sufficient particularity, rendering it facially deficient. Plaintiff did not identify with any degree of specificity the remarks made by two professors, which prevents judicial determination of whether the statements were defamatory. **Izydore v. Tokuta, 434.**

MEDICAL MALPRACTICE

American College of Surgeons guidelines—motion to strike—The trial court did not err in a medical malpractice action by allowing one of defendant’s expert witnesses to testify regarding the American College of Surgeons’ policy statement on physicians acting as expert witnesses. Even though the witness testified as to what the organization “would say” and the trial court could have granted plaintiff’s motion to strike, the Court of Appeals held that the trial court did not abuse its discretion. **Kearney v. Bolling, 67.**

Expert witness—American College of Surgeons guidelines—The trial court did not err in a medical malpractice action by allowing defense counsel to cross-examine plaintiff’s expert witness on the American College of Surgeons’ policy statement on physicians acting as expert witnesses. Permitting such testimony was not an abuse of discretion, and it did not undermine the trial court’s ruling that, as a matter of evidentiary law, the witness was qualified to render expert testimony. **Kearney v. Bolling, 67.**

Motion to amend complaint during trial—lack of informed consent claim—The trial court did not err in a medical malpractice action by granting defendant’s motion in limine and denying plaintiff’s motion to amend her complaint during trial, effectively prohibiting plaintiff for pursuing a claim based on lack of informed consent. Plaintiff did not comply with Rule 9(j) on the consent issue, and defense counsel’s questions at trial did not amount to litigation of a lack of informed consent claim. **Kearney v. Bolling, 67.**

MEDICAL MALPRACTICE—Continued

Qualification of medical expert witness—The trial court did not err in a medical malpractice action by qualifying one of defendant's witnesses as a medical expert. Because the expert testified that he was familiar with a town similar to Winston-Salem, that current demographic differences were the result of a later recent hurricane, that he associated with doctors in Winston-Salem, and that he felt very comfortable with his familiarity with the standard of care in Winston-Salem at the relevant time, the Court of Appeals could not conclude that the trial court had abused its discretion. **Kearney v. Bolling, 67.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—deficiency—value of property—Summary judgment for the bank was inappropriate in an action to recover the deficiency on a mortgage after a foreclosure at which the bank bought the property and defendants claimed the relief offered in N.C.G.S. § 45-21.36. A debtor who asserts the statutory defense under that statute bears the burden of forecasting evidence to show that there is a genuine issue of fact about the value of the property. Here, defendants relied on their own joint affidavit; the owner's opinion of value was competent to prove the property's value in North Carolina. **United Cmty. Bank v. Wolfe, 245.**

MOTOR VEHICLES

Automobile accident—contributory negligence—knowledge of driver's intoxication—In an action for damages allegedly caused by defendant's negligence in an automobile accident, the trial court erred by determining that plaintiff was grossly negligent as a matter of law and entering a directed verdict in favor of defendant. While plaintiff did voluntarily ride in defendant's car after defendant had been drinking, plaintiff testified that she did not believe that defendant was intoxicated. There was sufficient evidence for the issue of plaintiff's contributory negligence to be decided by the jury. **McCauley v. Thomas, 82.**

NATIVE AMERICANS

Hunting license exemption—recognized tribe—tribal land—Defendant Oxendine did not qualify for an exemption to hunting license requirements where he did not show an identity card indicating membership in a recognized Native American tribe. Moreover he was hunting on private property, not tribal land. **State v. Oxendine, 216.**

PENALTIES, FINES, AND FORFEITURES

Civil penalty—dumping waste material—remand for eight statutory factors—Although petitioner farm contended that it did not violate the provisions of N.C.G.S. § 143-215.1(a)(6) by dumping waste material into Cabin Branch Creek, and upholding the assessment of a civil penalty, this issue was remanded to the superior court with instructions to remand to the finder of fact, to make specific findings with regard to the eight statutory factors set forth in N.C.G.S. § 143B-282.1(b) and to formulate the amount of any civil penalty to be imposed. **House of Raeford Farms, Inc. v. N.C. Dep't of Env't, 294.**

Civil penalty—fined twice for same violation—The superior court did not err by determining that petitioner House of Raeford was fined "twice for the same violation," under N.C.G.S. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c), and

PENALTIES, FINES, AND FORFEITURES—Continued

assessing only one civil penalty. The superior court properly reviewed and ruled the Environmental Management Commission Final Decision and assessment of the two additional maximum civil penalties was error. **House of Raeford Farms, Inc. v. N.C. Dep't of Env't, 294.**

PLEADINGS

Motion to amend—denied—The trial court did not abuse its discretion by denying defendants' motion to amend their pleading to conform to the evidence by adding counterclaims. Defendants did not seek to add the claims earlier in the proceedings, and plaintiff did not expressly or impliedly consent to try these claims as part of the case. **Faucette v. 6303 Carmel Rd., LLC, 267.**

Notice requirements—not satisfied—Plaintiff failed to comply with the rudimentary notice pleading requirement of N.C.G.S. § 1A-1, Rule 8(a)(1) in a negligence action against a provider of propane arising from a carbon monoxide poisoning death in a barn. The complaint referred to "aforementioned negligence," but there was no mention of any duty owed by defendant, no allegation of unreasonable conduct, and no other reference to the essential elements of a negligence cause of action. **Murphy v. Hinton, 95.**

PROBATION AND PAROLE

Probation—improper extension—subject matter jurisdiction—The Buncombe County trial court lacked statutory authority under N.C.G.S. § 15A-1343.2(d) to order a three-year extension more than six months before the expiration of the original period of probation. Additionally, it lacked statutory authority under N.C.G.S. § 15A-1344(d) because defendant's extended period of probation exceeded five years. Thus, the Avery County trial court lacked subject-matter jurisdiction to enter the 2013 orders. The orders were vacated and remanded to the trial court. **State v. Hoskins, 168.**

PUBLIC OFFICERS AND EMPLOYEES

State employee—work rules—The work rules under which a UNC Health System employee were dismissed were applicable to her even though she had achieved career State employee status before the applicable date in N.C.G.S. § 116-37, which she contended meant that she was not subject to rules adopted after that date. The provisions in question were "written work rules"; there was no dispute that they were known to petitioner; and "written work rules" of this type were authorized by N.C.G.S. § 116-37(d)(2) as of 31 October 1998, and that had not changed. **Robinson v. Univ. of N.C. Health Care Sys., 614.**

Termination of employment—unacceptable personal conduct—The trial court did not err by concluding that respondent had just cause to terminate petitioner's employment. Petitioner had the burden of proving that her conduct was not unacceptable personal conduct as defined in the statute, but she did not deny that she had behaved in the manner respondent alleged and did not allege that any of the findings of fact were unsupported by the evidence. **Robinson v. Univ. of N.C. Health Care Sys., 614.**

Wrongful termination—burden of proof—The agency and trial court did not err in placing the burden of proof upon petitioner where petitioner was terminated from

PUBLIC OFFICERS AND EMPLOYEES—Continued

the UNC Health Care System for her conduct. Despite statutory changes, petitioner failed to demonstrate that the burden of proof applicable to her case changed, so it remained on the employee who was challenging just cause for termination. Also, the result would have been the same even if the burden of proof had been upon respondent, since petitioner did not deny that she behaved in the manner alleged by respondent and did not challenge any of the findings of fact as unsupported by substantial evidence. **Robinson v. Univ. of N.C. Health Care Sys.**, 614.

PUBLIC RECORDS

School board—closed session—resignation of superintendent—in camera review—The minutes of a school board's closed meeting at which the superintendent resigned and was given a \$200,000 severance package should have been examined in camera by the trial court judge after plaintiff requested the minutes and defendant claimed that they concerned an exempt personnel matter. Core personnel information such as the details of work performance and the reasons for an employee's departure remain permanently exempt from disclosure. But other aspects of the board's discussion in the closed session, including the board's own political and policy considerations, are not protected from disclosure. On remand, the trial court must review the minutes and determine which information is exempt from disclosure and which should be disclosed to the public. Furthermore, when the trial court's determination following an in camera review is disputed by the public body seeking to avoid disclosure, the trial court (or the appellate court, where necessary) should not hesitate to stay the disclosure order pending appeal by the aggrieved party. **Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ.**, 375.

REAL PROPERTY

Injury to real property—motion to dismiss—sufficiency of evidence—air conditioner—The trial court did not err by denying defendant's motion to dismiss the injury to real property charge based on alleged insufficient evidence that an air conditioner was real property. Given the manner in which the air-conditioner was attached to a mobile home, the fact that it was "gutted" instead of removed entirely, and the fact that it was attached by the property owner to the rental property for the use and enjoyment of the renters, there was substantial evidence in this case that the air conditioner was real property and not personal property. **State v. Hardy**, 146.

Jury instruction—classification—air conditioner—The trial court did not err by instructing the jury that an air conditioner constituted real property. The air-conditioner was properly classified as real property given the nature and circumstances surrounding its annexation to a mobile home. **State v. Hardy**, 146.

ROBBERY

Armed—jury instructions—lesser-included offenses—In defendants' trial for offenses stemming from an armed robbery, it was not error for the trial court not to instruct the jury on lesser-included offenses for one of the charges of armed robbery. An instruction on lesser-included offenses is required only when the evidence would allow the jury to find the defendant guilty of the lesser offense and acquit him of the greater. **State v. Calderon**, 125.

Attempt—jury instruction—acting in concert—omitted—In defendants' trial for offenses stemming from an armed robbery, it was not prejudicial error for the

ROBBERY—Continued

trial court to omit instructions on acting in concert from the attempted robbery jury instructions. Considering the evidence presented at trial and the jury instructions in their entirety, the Court of Appeals was not convinced that the instructions were likely to mislead the jury. **State v. Calderon, 125.**

Attempt—sleeping victim—acting in concert—In defendants' trial for offenses stemming from an armed robbery, the trial court did not err by denying defendants' motion to dismiss the charges of attempted robbery with a firearm as to one of the victims. The evidence showed that defendants brandished their weapons in the apartment and their co-perpetrator, with a shotgun in hand, approached the sleeping victim to take money from his pockets. **State v. Calderon, 125.**

Jury instructions—not-guilty mandate—In defendants' trial for offenses stemming from an armed robbery, it was not plain error when the trial court failed to deliver the "not guilty" mandate during its jury instructions on robbery with a firearm and common law robbery. This error did not amount to plain error because the trial court did not impermissibly suggest that defendants must be guilty, and the verdict sheets clearly informed the jury of its option of returning a "not guilty" verdict. **State v. Calderon, 125.**

SEARCH AND SEIZURE

Motion to suppress evidence—probable cause—search of vehicle exceeded scope of warrant—The trial court erred in a drugs case by denying defendant's motions to suppress evidence. Although a warrant was supported by probable cause, the search of a visitor's vehicle in the driveway exceeded the scope of the warrant for the residence. The underlying judgments were vacated and remanded for further proceedings. **State v. Lowe, 335.**

Residence—warrant—probable cause—marijuana residue found in bag in garbage—anonymous tip—The trial court did not err by concluding the warrant authorizing the search of a residence was supported by probable cause. Based on the totality of circumstances, the presence of marijuana residue found in a bag pulled from Turner's garbage, the anonymous tip that Turner was "selling, using and storing" narcotics in his home, and Turner's history of drug-related arrests, in conjunction, formed a substantial basis to conclude that probable cause existed to search his home for the presence of contraband or other evidence. **State v. Lowe, 335.**

Traffic stop—extended for drug dog—reasonable suspicion—The trial court did not err in partially denying defendant's motion to suppress evidence seized during a traffic stop in a prosecution for possession of cocaine and drug paraphernalia where a drug dog was called in. Defendant was observed and stopped in a high crime area, the officer saw that defendant had something in his mouth which he was not chewing and which affected his speech, the officer observed individuals attempt to hide drugs in their mouths, and defendant denied being involved in drug activity "any longer." Based on the totality of the facts, the trial court's unchallenged findings established a minimal level of objective justification for reasonable suspicion of criminal activity and the extension of the traffic stop. **State v. Warren, 496.**

Warrantless entry—broken apartment window—broad daylight and heavy traffic—The trial court erred by denying defendant's motion to suppress evidence obtained as a result of a warrantless entry into her apartment. The officers' testimony that they observed a broken window, found the apartment door unlocked, and

SEARCH AND SEIZURE—Continued

received no response from inside the apartment—was insufficient to support the conclusion that the officers had a reasonably objective belief that a breaking and entering was in progress or had been recently committed. These events took place in the middle of the day, in a heavy-traffic area of an apartment complex, and in view of many common areas of the complex. The Court of Appeals reversed the suppression order and vacated the judgment entered on defendant's guilty plea. **State v. Jordan, 464.**

SENTENCING

300 months—not grossly disproportionate to crimes pled guilty—no 8th Amendment violation—The Court of Appeals followed its precedent in a first-degree rape and first-degree sexual offense case and held that the original 300-month sentence imposed by the trial court did not violate the Eighth Amendment. A 300-month sentence was not grossly disproportionate to the two crimes to which defendant pled guilty. Furthermore, Defendant's 300-month sentence was less than or equal to the sentences of many other offenders of the same crime in this jurisdiction. **State v. Thomsen, 475.**

Aggravating factor—commission of crime during pre-trial release—due process—Defendant's constitutional right to due process was not violated when the trial court imposed an aggravated sentence for first-degree sexual offense with a child based on the aggravating factor of commission of a crime while on pre-trial release. The N.C. Supreme Court has held this aggravating factor to be constitutional, and the replacement of the Fair Sentencing Act with the Structured Sentencing Act does not affect the applicability of that holding. **State v. Harris, 162.**

Aggravating factor—commission of crime during pre-trial release—equal protection—Defendant's constitutional right to equal protection was not violated when the trial court imposed an aggravated sentence for first-degree sexual offense with a child based on the aggravating factor of commission of a crime while on pre-trial release. The language of N.C.G.S. § 15A-1340.16 applies to all defendants against whom the State seeks to prove the aggravating factor of committing a crime while on pretrial release. **State v. Harris, 162.**

Aggravating factor—DVPO—position of trust or confidence—The trial court did not err when sentencing defendant for feloniously violating a Domestic Violence Protective Order (DVPO) against his former girlfriend by finding as an aggravating factor that he took advantage of a position of trust or confidence. Defendant's argument to the contrary assumes that "trust and confidence" automatically exists in all of the "personal relationships" provided by the DVPO statute, but the definition of personal relationship under N.C.G.S. § 50B-1(B) does not include any element which would require proof of a position of trust or confidence or the abuse of that position any evidence offered by the State to show that defendant took advantage of a position of trust or confidence may be used to establish a statutory aggravating factor. **State v. Edgerton, 460.**

Felony larceny—felony possession of stolen goods—The trial court erred by sentencing defendant for both felony larceny and felony possession of stolen goods, and the trial court's order arresting judgment for felony possession of stolen goods did not cure the error. The case was remanded for resentencing. **State v. Hardy, 146.**

SENTENCING—Continued

Maximum too long—effective date of statute—The trial court erred in sentencing defendant for sexual offenses with a child by applying a statute enacted after defendant committed the crimes and calculating a maximum sentence that was too long. **State v. Purcell, 222.**

Prior record level—stipulation—questions of fact—On appeal from defendant's guilty plea to two counts of attempted first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the Court of Appeals dismissed defendant's argument that the trial court erred in sentencing him as a prior record level II offender. Defendant's stipulation that he had a prior out-of-state conviction and that the conviction was a felony in Michigan were questions of fact, not law. It would have been defendant's burden to demonstrate to the trial court that this prior conviction should be treated as a misdemeanor because of its substantial similarity with North Carolina's misdemeanor offense of carrying a concealed weapon. **State v. Edgar, 624.**

SETTLEMENT AND COMPROMISE

Settlement letter—Any error in the exclusion of a settlement letter in a conversion action was harmless in a bench trial where the trial court was aware that defendants made numerous conditional offers to settle but did not make those offers until the litigation had continued for years. The trial court's actual finding was that defendants did not unconditionally offer to pay the disputed amount, and the letter did not refute that finding. **Faucette v. 6303 Carmel Rd., LLC, 267.**

STATUTES

Compensation to persons erroneously convicted of felonies—posthumous pardons—Where four deceased persons received posthumous pardons of innocence and their estates filed petitions for compensation under Article 8, Section 48 of the General Statutes, the Court of Appeals affirmed the order of the Full Industrial Commission dismissing the estates' claims. The plain and unambiguous language of the statute does not allow compensation based on posthumous pardons of innocence. **Estate of Jacobs v. State of N.C., 396.**

STATUTES OF LIMITATION AND REPOSE

Abuse by priest—fraud—failure to take steps to investigate claims—The trial correctly granted summary judgment for defendant in an action for fraud arising from the sexual abuse of plaintiff John Doe 1K where the abuse occurred in 1977 and 1978 and plaintiff sued in 2011. Although plaintiff relied on the discovery rule and the contention that defendant had misrepresented that he would be safe under the supervision and care of the priest, plaintiff failed to exercise reasonable diligence in investigating his own claim. The alleged sexual abuse committed in this case is the type of event that triggers inquiry notice; moreover, this was not a case where plaintiff asserted any fraudulent concealment by defendant to hide wrongdoing after the fact. **Doe v. Roman Catholic Diocese of Charlotte, 538.**

Voluntary dismissal and refiling—tolling—initial pleading requirements not satisfied—The trial court properly dismissed a refiled complaint where the statute of limitations had expired and the initial complaint did not satisfy N.C.G.S. § 1A-1, Rule 8(a)(1)'s pleading requirements. In order to benefit from the one-year filing

STATUTES OF LIMITATION AND REPOSE—Continued

extension provided in Rule 41(a), the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10 and 11 of the North Carolina Rules of Civil Procedure (but Rule 12(b)(6) is not a rule setting out a pleading requirement). **Murphy v. Hinton, 95.**

TAXATION

Income and gift taxes—law of residency—change of domicile—The trial court did not err by allegedly misapplying the law of residency for tax purposes when it concluded that petitioners satisfied their burden to prove a change of domicile to Florida on 20 January 2006. The Department of Revenue acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes. **Fowler v. N.C. Dep't of Revenue, 404.**

TERMINATION OF PARENTAL RIGHTS

Jurisdiction—standing—paternal grandmother filing petition—The trial court was without subject matter jurisdiction and an order terminating a father's parental rights was vacated where the petitioner, the paternal grandmother, did not fall within any of the categories enumerated in N.C.G.S. § 7B-1103(a) and therefore lacked standing. **In re J.A.U., 603.**

TRUSTS

Statutory Payable on Death account—did not supplant common law Totten Trust—Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the statutory Payable on Death account is the sole means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. The General Assembly expressed a clear intent for the Payable on Death statute (N.C.G.S. § 54-109.57) to supplement, not to supplant, the existing common law of trust formation. **Nelson v. State Emps. Credit Union, 447.**

Totten Trust—summary judgment—Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the credit union had failed to show that a common law Totten trust had been created. The credit union presented undisputed evidence that the grantor created a common law Totten trust as a matter of law: the grantor expressed his intent to create a trust, identified the specific sum of money to be placed into the trust account, and identified the beneficiary of the trust. **Nelson v. State Emps. Credit Union, 447.**

Two summary judgment proceedings—different issues—statutory trust—common law trust—Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the trial court (Judge Baddour) did not impermissibly overrule an earlier summary judgment ruling by Judge Blount. Judge Baddour did not rule that Judge Blount's summary judgment order—which only considered whether the credit union had violated N.C.G.S. § 54-109.57—was erroneous. Rather, Judge Baddour ruled that, notwithstanding the statutory violation found by Judge Blount, the credit union should prevail under the common law. **Nelson v. State Emps. Credit Union, 447.**

UNFAIR TRADE PRACTICES

Attorney fees awarded—no abuse of discretion—The trial court did not abuse its discretion in an unfair trade practices claim arising from a conversion where the trial court awarded attorney fees to plaintiff's counsel. The trial court did not err by concluding that defendants' conduct was willful or in the amount of fees awarded. **Faucette v. 6303 Carmel Rd., LLC, 267.**

Conversion of money—sufficient for claim—The trial court did not abuse its discretion in a conversion action by concluding that defendants had committed an unfair or deceptive trade practice where the findings were supported by defendants' failure to unconditionally return the money. The mere act of tortious conversion can satisfy the elements of a Chapter 75 claim. Here, defendants abused their positions of power to withhold payment of the money plaintiff was owed, solely to pressure to plaintiff to resolve unrelated disputes, and their actions were in or effecting commerce. **Faucette v. 6303 Carmel Rd., LLC, 267.**

WILLS

Reference to will as exhibit—sufficiently accurate—The trial court did not err or abuse its discretion in a caveat proceeding by referring to propounders' proffered "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010" as "Propounders Exhibit 2" on the jury verdict sheet. Although the caveators argued that the record failed to contain a paper writing marked as "Propounders' Exhibit 2, the propounders, caveators, and the trial court agreed to compile exhibits into a notebook referred to as Courtroom Exhibit 1, with the decedent's Last Will and Testament included in Courtroom Exhibit 1 and marked for identification and referred by propounders as Exhibit 2. The phraseology of the issues presented was sufficiently accurate to resolve any factual controversies and enabled the trial court to fully render judgment in the cause; further, the trial court's judgment clearly resolved any perceived ambiguity. **In re Estate of Pickelsimer, 582.**

WORKERS' COMPENSATION

Company conference—laser tag—all expenses paid by company—In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, there was copious competent evidence supporting the Industrial Commission's finding that the company controlled and paid for all components of the conference. **Holliday v. Tropical Nut & Fruit Co., 562.**

Company conference—laser tag—business event—In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, there was evidence supporting the Industrial Commission's characterization that the laser tag was more of a business event that was calculated to further, directly or indirectly, the employer's business than a social or employee appreciation event. **Holliday v. Tropical Nut & Fruit Co., 562.**

Disability—total knee replacement—work restrictions—Defendants contend that the Industrial Commission's determination that "Plaintiff was and remained disabled as of 24 May 2013, the date he underwent total knee replacement surgery" was not supported by sufficient evidence because there was no evidence presented regarding plaintiff's work restrictions following his knee replacement surgery. Contrary to defendants' assertions, the absence of evidence as to the type of limited or restricted work plaintiff could perform did not bar his disability claim because Dr. Barnett's testimony supported the conclusion that plaintiff was incapable of

WORKERS' COMPENSATION—Continued

performing any work after his knee replacement. **Holliday v. Tropical Nut & Fruit Co., 562.**

Injury arising from employment—laser tag—In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, the Industrial Commission did not err in finding that plaintiff's injury arose out of his employment. None of the N.C. cases cited involved a situation where the employee's attendance was expressly mandated at the event in question or where the employer received a benefit from the event beyond an intangible improvement to employee morale. The nexus between the injury and the employment in the present case was substantially greater than that in the cases relied upon by defendants. **Holliday v. Tropical Nut & Fruit Co., 562.**

Injury by accident—company conference—laser tag—specific evidence of injury—The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's knee injury constituted an injury by accident. Plaintiff's testimony that he felt a "sharp pain" in his leg approximately 15 minutes into the activity and that he "could tell something was wrong" once he attempted to move from his position was sufficiently specific to demonstrate that the injury he suffered was neither a mere gradual build-up of pain nor a result of "multiple events occurring over a period of time. Moreover, defendants did not cite any case law requiring greater specificity under analogous circumstances so as to mandate a contrary result. **Holliday v. Tropical Nut & Fruit Co., 562.**

ZONING

Notice to abutting property owners—certification—conclusive in absence of fraud—On a summary judgment motion in an action concerning a rezoning ordinance, the trial court erred by concluding there was no genuine issue of material fact that certain abutting property owners did not receive notice of the Board of Commissioner's hearing as required by statute. Pursuant to the statute, the certification that notices were sent is deemed conclusive in the absence of fraud. **Good Neighbors of Or. Hill Protecting Prop. Rights v. Cnty. of Rockingham, 280.**

Spot zoning—"single person" ownership requirement—On appeal from the denial of Rockingham County's summary judgment motion in an action concerning a rezoning ordinance, the Court of Appeals held that the rezoning was not spot zoning because the tract of land in question was owned by a father and son rather than a "single person." The Court of Appeals further concluded that the trial court improperly weighed the evidence and substituted its judgment for that of the Board of Commissioners. The case was reversed and remanded for a new summary judgment hearing. **Good Neighbors of Or. Hill Protecting Prop. Rights v. Cnty. of Rockingham, 280.**

Summary judgment motion—improper weighing of evidence—On a summary judgment motion in an action concerning a rezoning ordinance, the trial court erred by concluding that there was no genuine issue of material fact that the rezoning applicant had violated the zoning ordinance by pouring a concrete pad on the tract of land before submitting his rezoning application. The trial court improperly weighed the evidence to reach this conclusion. **Good Neighbors of Or. Hill Protecting Prop. Rights v. Cnty. of Rockingham, 280.**

